THE

ENGLISH AND INDIAN
LAW OF TORTS

BY

RATANLAL RANCHHODDAS B A LL B

ADVOCATE BOMBAY HIGH COURT

AND

DHIRAJLAL KESHAVLAL THAKORE B A

OF LINCOLN'S INN BARRISTER AT LAW

Editors of The Bombay Law Reporter Authors of
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The Law of Evidence The Criminal Procedure Code etc

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PREFACE
TO
THE TWELFTH EDITION

THIS edition has undergone thorough revision Statutory changes in common law principles and fresh case law have involved considerable modification in the text The Law Reform (Miscellaneous Provisions) Act 1934 has given statutory burial to the much criticised maxim *actio personalis moritur cum persona* The Law Reform (Married Women and Tort feasors) Act 1935 has put upon a new plane the liability of married women and of joint tort feasors. *Flint* v *Lovell* *Rose* v *Ford* *Haynes* v *Harwood* and *Grant* v *Australian Knitting Mills* illustrate once more the elasticity of case-law in evolving principles applicable to virgin problems or changing circumstances The maxim *volenti non fit injuria* has met with an important limitation and *novus actus interveniens* has received further elucidation in *Haynes* v *Harwood* The law dealing with the position of rescuers which had its origin in America and was referred to in all the previous editions of this work has been adopted for the first time by the Court of Appeal in England These and other minor changes have necessitated the re casting of several portions of this edition The case law has been scrupulously brought down to date

The Indian Easements Act which codifies the law relating to easements has been reproduced in Appendix II

Every endeavour has been made to increase the utility of this edition as a text book for students of law and a reliable book of reference for the profession

May 1938

R R
D K. T

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FROM THE PREFACE TO THE SECOND EDITION

As there was no work on the Law of Torts which contained a lucid exposition and a methodical arrangement both of the principles of the English common law and of the Indian case law the writers of the present treatise conceived the idea of making an effort to the best of their ability towards supplying this long felt *desideratum*

*   *   *

One special feature maintained in the study of details is the distinctive exposition of principles apart from the facts of the cases from which they are evolved Those principles are in the first place set out *in extenso* They are then followed by cases illustrative of their application and effect and they are further supplemented by cognate cases explanatory of their meaning To draw the attention of the reader by mechanical aid the titles of leading cases are printed in heavy type

The first nine chapters are so designed as to present to the student a groundwork of or a preliminary discourse on the whole subject In the first chapter what amounts to a tort is broadly explained at considerable length In the second are discussed elements such as intention knowledge motive etc and the part which each plays in this branch of the law The third chapter treats of the personal disabilities of such persons as can neither sue nor be sued in tort The supposed rule of merger of trespass in felony and its exclusion from the Indian law is next handled in chapter four The fifth chapter deals with the conditions under which a remedy may be found in a British Court for a tort committed outside the limits of its territorial jurisdiction In the sixth chapter are grouped together the general defences or justificatory pleas to an action of tort The seventh chapter treats of the discharge of torts or the different modes in which the liability of a wrong doer can be determined Chapter eight is devoted to the constructive liability so to speak of certain classes of persons for wrongs committed by third parties such liability arising either by ratification or by virtue of their jural relations as master and servant, owner and his independent contractor principal and agent, company and its directors firm and its partners guardian and ward and lastly husband and wife. *The nature of different reliefs for torts is expounded in chapter nine.*

*

After dealing in this wise with the general principles the classifications of specific wrongs as given by various text writers are set out in chapter ten

*

The consideration of specific torts begins from the eleventh chapter with the law of Assault and Battery The twelfth chapter is devoted

to False Imprisonment and chapter thirteen deals exhaustively with Defamation. The infringements of rights founded on domestic relations such as depriving a husband of the society of his wife a parent of the services and companionship of his daughter a master of the services of his servant, and a ward of the protection of his guardian are discussed in chapter fourteen The fifteenth treats of the various wrongs against good faith excepting Deceit The sixteenth disposes of torts to realty or immovable property The seventeenth deals with torts to Personalty or Movable Property and the eighteenth with such species of Incorporeal Personal Property as Patent Copyright Trade mark and Trade name The nineteenth treats of Fraud and Misrepresentation and the twentieth of Nuisances. Negligence is discussed in chapter twenty one.

In addition to this series of specific wrongs there is a well marked class of injuries which lies in the midlands as it were, between the laws of Contract and of Tort. These are dealt with in the twenty second and last chapter under the head of Torts founded on Contract Throughout this treatise the nature of remedies and the measure of damages for each particular wrong have been fully given so far as was practicable in connection with it

In the Appendix are collected together in the order of the foregoing chapters of the treatise select questions set at the Pleaders and the University Law Examinations held in the different Presidencies within the last twenty five years These selections are chiefly intended to indicate to the student the various aspects of the same law from the manifold points of view of examiner and it is hoped they will serve him as fairly searching tests for self examination

EXPLANATIONS OF ABBREVIATIONS

A & E	Adolphus and Ellis, 1834 1840 New Series 1841 1852 K B
A. C	Appeal Cases Law Reports from 1891—
Agra	Agra High Court Reports 1866 1868
All.	Indian Law Reports Allahabad Series from 1876—
All E R.	All England Reports from 1936—
A L J R	Allahabad Law Journal Reports from 1904—
App Cas.	Appeal Cases, Law Reports, 1876 1890
Amb	Ambler s Reports 1737 1784 Ch
Anstr	Anstruther 1792 1797 Exch
Arn	Arnold s Reports 1838 1839 C P
Asp	Aspinall s Maritime Cases 1873 1878
Atk	Atkyn s Reports 1836 1856 Ch
A W N	Allahabad Weekly Notes from 1881 1908
B & Ad	Barnewall and Adolphus 1830 1834 K B
B & Ald	Barnewall and Alderson 1817 1822 K B
B & B	Broderip and Bingham 1819 1822 C P
B & C	Barnewall and Creswell 1822 1830 K B
B & P	Bosanquet and Puller 1796-1807 C P
B & P N R	Bosanquet and Puller s New Reports 1804 1807 K B
B & S	Best and Smith 1861 1869 Q B
B H C	Bombay High Court Reports 1862 1875
Beng L R.	Bengal Law Reports 1865 1875
Br & G	Brownlow & Gouldesborough s Reports 1569 1624 C P
Bacon	Bacon s Abridgment of the Law
Barnard.	Barnardiston s Reports 1740-1741
Barne	Barne s Notes of Cases in Chancery 1732 1760
Beav	Beaven s Reports 1838 1866 Rolls
Bing	Bingham s Reports 1822 1834 C P
Bing N C	Bingham s New Cases, 1834 1840 C P
Blackf	Blackford s Reports 1817 1838 Indiana
Bom.	Indian Law Reports Bombay Series from 1876—
Bom. L R.	Bombay Law Reporter from 1899—
Bom L R J	Bombay Law Reporter Journal from 1900—
Boul	Boulnois Reports 1856-1859 Calcutta
Bourke	Bourke s Reports 1865 Calcutta.
Bulls	Bullstrode s Reports 1609 1639 K B
Burma L J	Burma Law Journal from 1922 1926
Burma L R	Burma Law Reports from 1896 1909
Burma L T	Burma Law Times from 1908-1920
Burr	Burrow's Reports 1757 1771 K B
C & E	Cababe and Ellis, 1883 1884 K B
C & J	Crompton and Jervis, 1830-1832 K B
C & K	Carrington and Kirwan 1843 1850 N P
Car & Mar	Carrington and Marshman 1840 1842 N P
C L J	Calcutta Law Journal Reports from 1905—
C L R.	Calcutta Law Reports 1878 1883
C & P	Carrington and Payne 1823 1841 N P
Cal.	Indian Law Reports, Calcutta Series, from 1876—
Cl & F	Clark and Finnelly 1831 1846 H L
C W N	Calcutta Weekly Notes from 1896—
Camp	Campbell s Reports, 1808 1816 N P
C B	Chief Baron
C B	Common Bench Reports, 1845 1856 C P
C B N S.	Common Bench New Series, 1856 1865 C P
C P D	Common Plea Division Law Reports 1875 1890
Ch.	Chancery Law Reports, from 1891—

Ch. D	Chancery Division Law Reports 1875-1890
Chit.	Chitty's Reports.
Civ P C	Civil Procedure Code Act V of 1908.
Coke	Coke's Reports, 1752 1816
Cowper	Cowper's Digest of the Law of England.
Conn.	Connecticut intermediate and last resort
Cor	Coryton's Reports, 1862 1863 Calcutta.
Cowp	Cowper's Reports, 1771 1778 K. B
Cox	Cox's Criminal Cases, from 1843—
Cr & J	Crompton and Jervis Exchequer Reports
Cr & M.	Crompton and Meeson 1832 1834 Exch
Cr M & R.	Crompton Meeson and Roscoe's Exch Reports 1834 1836
Cr R	Criminal Rulings from 1869 1909 Bombay
Crim P C.	Criminal Procedure Code Act V of 1898
Cro Car	Croke's Reports in the Reign of King Charles I
Cro Eliz	Croke's Reports in the Reign of Queen Elizabeth
Cro Jac.	Croke's Reports in the Reign of King James, 1582 1641
Cush.	Cushing's Reports, Massachusetts
D & B	Dearsley and Bell 1856-1858 C C
D & M	Davison and Merivale 1843 1844 Q B
D & R.	Dowling and Ryland 1821 1827 K B
Dears.	Dearsley's Crown Cases 1852 1856
De G F & J	De Gex Fisher and Jones 1859 1862
De G J & S	Jones and Smith 1862 1865
De G M. & G	Macnaghten and Gordon 1851 1857
De G & J	and Jones, 1860-1862
D G & S	and Smale 1846 1852
Den N Y	Denio New York intermediate and last resort
Doug	Douglas Reports, 1778 1784 K B
Dow	Dow's Reports, 1802 1818 H L
Dowl. P C	Dowling's Practice Cases 1830-1840 C L C
Dowl N S	New Series 1841 1842 C L C
Dr & Sm.	Drewry and Smale Chan
Dyer	Dyer's Reports 1513 1538 K B
E & B	Ellis and Blackburn 1852 1858 Q B
E B & E	and Ellis 1858 Q B
E & E	Ellis and Ellis 1858 1861 Ch
East	East's Reports 1801 1812 K B
Esp	Espinasse's Reports 1793 1807 N P
Ex. D	Exchequer Division Law Reports 1875 1890
Exch	Exchequer Reports, 1847 1856
Eq	Equity 1875 1890
F & F	Foster and Finlayson 1858 1867 N P
Fitz	Fitzgibbon's Reports 1728 1733 K B
Fortes	Fortesque's Reports 1695 1738 K B
Freem.	Freeman's Reports 1660 1706 Ch
G & D	Gale and Davison 1841 1842 K B
Giff	Giffard's R ports, 1857 1865
Godb	Godbolt's Reports 1575 1638 K B
Gow	Gow's Reports 1818 1820 N P
Gray	Gray's Reports Massachusetts
H & C	Hurlstone and Coltman 1862 1865 Exch
H & H	Horn and Hurlstone 1838 Exch
H & M	Hemming and Miller 1862 1865 Ch
H & N	Hurlstone and Norman 1856-1861 Exch
H & R.	Harrison and Rutherford 1865 1866 C P
H & W	{Harri on and Wollaston 1830 1836 K B {Hurlstone and Walmsey 1840-1841 Exch.
H Bl.	Henry Blackstone's Reports, 1788-1796 C P
H L C	House of Lords Cases by Clark 1847 1866
Hale	Hale's Pleas of the Crown

Hardres	Hardres Reports 1655 1669 Exch.
Hare	Hare's Reports 1841 1853
Hawk P C	Hawkins Pleas of the Crown
Hay	Hayes Reports 1830-1832 Exch Ireland.
	Hay's Reports, 1862 1863 Calcutta.
Hill	Hill's Reports 1833 1835 South Carolina.
	Hill's Reports 1841 1842 New York.
Hob	Hobart's Reports 1603 1625 K. B
Hodges	Hodge's Reports 1835 1837 C P
Holt	Holt's Reports 1815 1817 N P
Holt N P	Holt's Nisi Prius Reports
How St Tr	Howell's State Trials
Hutt	Hutton's Reports 1612 1639 C P
Hyde	Hyde's Reports 1863 1864 Calcutta
I C W	Indian Civil Wrongs Bill
I P C	Indian Penal Code (XLV of 1860)
I C L	Irish Common Law Series 1866 1878
Ir C L R.	Irish Common Law Reports 1850 1866
Ir Ch R.	Irish Chancery Reports 1850 1866
Ir L R.	Irish Law Reports 1879 1890
Ind Jur N S	Indian Jurist New Series 1866-1867 Calcutta.
Ind Jur O S	Old Series 1862 Calcutta.
Ired	Iredell's Reports 1840 1841 North Carolina.
I R	Irish Reports from 1891—
J & H	Johnson and Hemming 1859 1862 Ch
J I	Justice of the Peace
Jacob	Jacob's Reports 1821 1822 Ch
John	Johnson's Reports 1858 1860 Ch
Johns.	Johnson's Reports 1806-1823 New York
Jur	Jurist 1837 1866
Jur N S	Jurist New Series 1837 1866
K B	Law Reports King's Bench from 1891—
K & J	Kay and Johnson 1854 1858
Keb	Keble's Reports 1661 1679 K B
Keen	Keen's Reports 1836 1838 Ch
Kely	Kelynge's Reports 1662 1669 K B
Kelly	Kelly's Georgia.
L B R	Lower Burma Rulings from 1901 1922
L & C	Leigh and Cave's Crown Cases 1861 1865
L C	Lord Chancellor
L C J	Lord Chief Justice
L J	Lord Justice
L J Adm	Law Journal Admiralty from 1822—
L J C B	Common Bench
L J C P	Common Pleas,
L J Ch	Chancery
L J Ex.	Exchequer
L J H L	House of Lords
L J K B	King's Bench
L J M C	Magistrate's Cases
L J Mat	Matrimonial Cases,
L J P C.	" Privy Council
L J P & M	Probate and Matrimonial
L J Q B	" Queen's Bench
L L J	Lahore Law Journal from 1920-1930
L R.	Law Reports Old Series 1866-1875
L R App Cas	Appeal Cases "
L R. C P	" Common Pleas,
L R C C R	Crown Cases Reserved
L R Ch App	Chancery
L R Eq	Equity

L R Ex.	Law Reports Exchequer 1866-1875
L R H L.	House of Lords,
L R I A.	Indian Appeals,
L R Ir	Ireland,
L R P C.	Privy Council "
L T	Law Times, 1845 1858
L T N S	Law Times, New Series, from 1859—
L W	Law Weekly Madras, from 1914—
Ld. Raym.	Lord Raymond s Report. 1691 1731 K B & C P
Lah.	Indian Law Reports Lahore Series from 1920—
Lane	Lane s Reports, 1605-1612 K. B
Lan	Lansing New York Intermediate.
Lev	*Levinz s Reports 1660-1697 K B*
Lofft	Lofft s Reports, 1772 1774 K. B
Luck.	Indian Law Reports Lucknow Serie from 1926—
Lutw	Lutwyche s Reports, 1682 1704 C P
M & A.	Montague and Ayrton 1833 1838 Bankruptcy
M & C	Mylne and Craig 1835-1840 Ch
M & G	Macnaghten and Gordon 1848 1852
M & Gr	Manning and Granger 18 0-1815 C P
M & M	Moody and Malkin 1826-1844 N P
M & P	Moore and Payne 1828 1831 C P
M & R.	Moody and Robinson 1830 1843 N P
M & Ry	Manning and Ryland 1827 1837 K B
M & S	Maule and Selwyn 1813 1819 K B
M & Sc	Moore and Scott 1831 1834 K B
M & W	Meeson and Welby 1836 1847 Exch
M H C	Madras High Court Reports 1862 1876
M I A.	Moore s Indian Appeals 1836 1837 P C
M P C	Moore s Privy Council Cases.
M Dig	Morley s Digest Calcutta
M R	Master of the Rolls.
Macq	*Macqueen s Practice in H L & P C*
Macq Sc App	Macqueen s Scotch Appeals 1852 H L
Mad	Indian Law Reports Madras Series from 1876—
Madd	Maddock s Reports 1815 1822 Ch
M L J	Madras Law Journal Repor s from 1891—
M L T	Madras Law Times from 1906 1925
M W N	Madras Weekly Note from 1910—
Marsh	Marshall 1813 1816 C P Marshall 1862 1863 Calcutta
McC	McCord s Reports 1820 1828 South Carolina
Mer	Merivale s Reports, 1815 1817 Ch
Met	Metcalf s Reports 1840 1846 Massachusetts.
Mich	Michigan U S
Mod.	Modern Reports 1669 1732 K B
Mont D & De G	Montague Deacon and De Gex 1840-1844 Bank.
Mont. & M	Montague and Macarthur 1826 1830 Bank.
Moo	Moody's Crown Cases Reserved 1824 1844
Moore	Moore s Reports 1817 1827 C P [1862 1873
Moore P C	Moore s Privy Council Cases 1836-1862 New Series,
Myl & K	Mylne and Keen s Chancery Reports.
Nag	Indian Law Reports Nagpur Series from 1936—
N & M	Neville and Manning 1832 1836 K. B.
N & P	Neville and Perry 1836-1838 K. B
N L R	Nagpur Law Reports, 1906 1936
N R.	Bosanquet and Puller s New Reports 1804 1807 C. P
N W P	North West Provinces High Court Reports, 1869-1875
N Y R	New York Reports
Noy	Noy s Reports 1559 1649 K. B
O C	Oudh Cases 1898 1926

O W N	Oudh Weekly Notes, from 1924—
P	Law Reports Probate Division from 1891—
P & D	Perry and Davison 1838 1841 Q B
P C	Privy Council
P D	Law Reports Probate Division 1875 1890
P J	Printed Judgments Bombay 1869 1898
P J L B	Printed Judgments Lower Burma 1892 1900
P L J	Patna Law Journal 1916 1921
P L R	Punjab Law Reporter from 1900—
P L T	Patna Law Times from 1920—
P L W	Patna Law Weekly 1916 1918
P W R	Punjab Weekly Reporter 1906 1922
& M	Pollock and Maitland s History of English Law
R	Punjab Record 1866-1919
W	Peere Williams 1695 1735 Ch
W N	Patna Weekly Notes from 1936—
& W	Pollock and Wright s Essay on Possession
alm	Palmer s Reports 1619 1629 K B
at.	Indian Law Reports Patna Series from 1922—
at L R	Patna Law Report 1923 1925
eake N P C	Peake s Reports 1790 1807 N P
eters	Peter s Reports 1827 1843 Supreme Court of United States
n	Phillip s Reports 1841 1849 Ch.
oph	Popham s Reports 1592 1627 K B
nce	Price s Reports 1814 1824 Exch
B	Law Reports, Queen s Bench from 1891—
B D	Law Reports Queen s Bench Division 1875 1890
& M	Ryan and Moody 1823 1826 N P
& My	Russell and Mylne 1829 1833 Ch
L R	Rangoon Law Reports from 1937—
P C	Reports of Patent Cases
& R	Russell and Ryan Crown Cases 1799 1823
R	Revised Reports, by Sir Frederick Pollock.
il Cases	Railway Cases
n	Indian Law Reports Rangoon Series, 1923 1937
p	Lord Coke s Reports
ll Abr	Rolle s Abridgment.
ll Rep	Rolle s Reports Banl
& G	Smale and Giffard 1852 1857 Ch
A	Second Appeal
C	Same Case.
J L B	Select Judgments Lower Burma 1872 1892
R. A	Specific Relief Act (I of 1877)
k	Salkeld s Reports, 1689 1712 K B
ind.	Saunder s Reports, 1666 1673 K B
	Sayer s Reports 1751 1756 K B
L R	Scottish Law Reporter
S C	Scottish Court of Session Cases
tt	Scott s Reports 1834 1840 C P
tt N R	Scott s New Reports 1840 1845 C P
v N P	Selwyn s Reports N P
w Sc Ap	Shaw s Scotch Appeal Cases 1821 1824
wer	Shower s Reports 1694 1699 H L
	Siderfin s Reports 1657 1670 K B
	Simon s Reports 1826 1852
N S	Simon s Reports New Series 1850 1852
ı	Skinner s Reports
	Smith s Reports K B
L C	Smith s Leading Cases
k.	Starkie s Reports 1814 1823 N P
Tr	State Trials.

Str	Strange s Reports, 1795 K. B
Sty	Style s Reports, 1645 1646 K B
Swans.	Swanston s Reports 1818 1819 Ch
Tyr & G	Tyrwhitt and Granger 1835 1836 Exch
T R.	Durnford and East s Term Reports, 1785 1800 K. B
Taunt.	Taunton s Reports 1807 1819 C P
Tex. App	Texas Court of Appeal
T L. R	*The Times* Law Reports, from 1885—
Tyr	Tyrwhitt 1830-1835 Exch
U B R.	Upper Burma Rulings 1892 1922
U P L R.	United Provinces Law Reporter 1919 1922
Unrep All.	Unreported decisions, Allahabad.
Unrep Bom.	Bombay
Unrep Cal.	Calcutta.
Unrep Eng	English
V C	Vice Chancellor
Vaugh	Vaughan s Reports 1665 1674 C P
Vent.	Ventris s Reports, 1668 1691 K B & C P
Vern.	Vernon s Reports, 1681 1720 Ch
Ves.	Vesey s Reports, 1789 1817 Ch
Ves. Sen	Vesey Senior s Reports 1747 1756 Ch
Ves. & B	Vesey and Beame, 1812 1814 Ch
Viner	Viner s Abridgment of Law and Equity
W Bl	Sir William Blackstone s Reports 1749 1779 K B & C P
W N	Weekly Notes, England
W R.	Sutherland s Weekly Reporter 1862 1876 Calcutta.
W R.	Weekly Reporter 1852 1906
W & T L C	White and Tudor's Leading Cases in Equity
W W & H.	Wilmore Woolaston and Hodges Q B
Wall	Wallace Supreme Court of U S
Webs. R.	Webster s Reports on Patent Cases
Wend	Wendall New York intermediate and last resort.
Willes	Willes Reports.
Wils.	Wilson s Reports 1805 1817 K B & C P
Wis.	Wisconsin
Wms. Saun	Williams Notes to Saunders Reports
Y & C	Younge and Colyer 1834 1842 New Cases, 1841 1842 Eq
Y & J	Young and Jervis 1826 1830 Exch
Y B	Year Books.
Yelv	Yelverton s Reports 1603 1613 K B

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THE LAW OF TORTS.

GENERAL PRINCIPLES

CHAPTER I

1 THE LAW OF TORTS AS ADMINISTERED IN BRITISH INDIA

THE LAW of torts as administered in British India is the English law as modified by Acts of the Indian Legislature. But its origin is not the same as regards all the Courts.

The first British Courts established in India were the Mayor's Courts in the three Presidency towns of Calcutta, Madras and Bombay. These Courts were established in the eighteenth century, and the charters which established them introduced into their jurisdiction the English common and statute law in force at the time so far as it was applicable to Indian circumstances. Similar jurisdiction was conferred upon the Supreme Courts which were established some time later in those three towns. The Supreme Courts were superseded by High Courts in those three towns, but the jurisdiction to administer the English common law was continued. The law of torts is part of the common law, and it was thus that the English law of torts came to be applied in the Presidency towns of Calcutta, Madras and Bombay. But the common law so applied by the High Courts of Calcutta, Madras and Bombay is applied only by those Courts in the exercise of their ordinary original civil jurisdiction as distinguished from appellate jurisdiction, that is, the jurisdiction to hear appeals from decrees of mofussil Courts.

The High Courts of Allahabad, Patna, Lahore and Nagpur have no original jurisdiction. The High Court of Rangoon has original jurisdiction, but the law to be applied by that Court in the exercise of that jurisdiction is the same which would have been applied by the Chief Court of Lower Burma if the High Court had not been established.[1]

As regards other Courts in British India there is no express provision for the administration of the English common law. These Courts have been established by Acts almost all local, and the Acts establishing them contain each a section which requires them in the absence of any specific law or usage to act according to "equity and good conscience." The expression "equity and good conscience" has been held by the Judicial

1 See Letters Patent for the High Court of Rangoon, clause 17.

Committee of the Privy Council to mean the rules of English law so far a they are applicable to Indian society and circumstances[1]

The law as stated above is also the law to be administered by each o the seven High Courts in the exercise of its appellate jurisdiction.[2]

The result is that the law of torts as administered by all the Courts i British India is the English law of torts so far as it is applicable to India circumstances

2 NATURE OF TORT

The term tort is the French equivalent of the English word wrong and of the Roman term *delict* It was introduced into the English law b Norman jurists The word tort is derived from the Latin term *tortum* to twist and implies conduct which is twisted or tortious It now means a breach of some duty independent of contract between citizens giving rise t a civil cause of action and for which compensation is recoverable A tor may be defined as a civil wrong independent of contract for which the ap propriate remedy is an action for damages A civil injury for which a action for damages will not lie is not a tort e g public nuisance for whic no action for damages will lie by a member of the public. The perso committing a tort or wrong is called a tort feasor or wrong doer

There is a well marked distinction between a contract and a tort A contract is founded upon consent a tort is inflicted against or withou consent A contract necessitates privity between the parties to it in tor no privity is needed

A tort must also be distinguished from a pure breach of contract First a tort is a violation of a right *in rem* i e. of a right vested in som determinate person either personally or as a member of the community and available against the world at large whereas a breach of contract is a infringement of a right *in personam* i e of a right available only again some determinate person or body and in which the community at larg has no concern The distinction between the two lies in the nature of th duty that is violated In the case of a tort the duty is one imposed by th law and is owed to the community at large. In the case of a contract th duty is fixed by the will and consent of the parties and it is owed to a de finite person or persons. Thus if A assaults B or damages B s property with out lawful cause or excuse, it is a tort Here the duty violated is a duty imposed by the law and that is the duty not to do unlawful harm to the per son or property of another But if A agrees to sell goods to B for a price and either party fails to perform the contract the case is one of a breach o contract Here there is no duty owed by A except to B and none owed by B except to A The duty that is violated is a specific duty owed by either

[1] *Waghela Rajsanji v Sheikh Masludin* (1887) 14 I A. 89 96

[2] As to Calcutta, Madras and Bombay see Letters Patent clause 21 as to Allahabad Patna Lahore and Nagpur see Letters Patent clause 14 as to Rangoon see Letters Patent, clause 20

party to the other alone, as distinguished from a general duty owed to the community at large Secondly in a breach of contract the motive for the breach is immaterial in a tort it is often taken into consideration Thirdly in a breach of contract damages are only a compensation in an action for tort to the property they are generally the same But where the injury is to the person, or character or feelings and the facts disclose fraud malice violence cruelty or the like exemplary damages are inflicted to serve an example, and by way of punishing the defendant Exemplary or vindictive damages cannot be recovered in an action on a contract except in an action for breach of promise of marriage

The same act may amount to a tort and a breach of contract Person such as carriers solicitors or surgeons who undertake to discharge certain duties and voluntarily enter into contracts for the due performance thereof will be liable for neglect or unskilfulness either in an action for a breach of contract or in tort. The breach of such contracts amounts also to a tort because such persons would be equally liable even if there was no contract as they undertake a duty independently of any contract A father employs a surgeon to attend on his son The son is injured by unskilful treatment Here there is a contract between the father and the surgeon but none between the son and the surgeon The father therefore may sue the surgeon in contract but the son can sue him only in tort[1]

A tort is also widely different from a crime First a tort is an infringement or privation of the private or civil rights belonging to individuals considered as individuals whereas a crime is a breach of public rights and duties which affect the whole community considered as a community Secondly in tort the wrong doer has to compensate the injured party whereas in crime he is punished by the State in the interests of society Thirdly in tort the action is brought by the injured party in crime the proceedings are conducted in the name of the Sovereign and the guilty person is punished by the State

The same set of circumstances will in fact from one point of view constitute a tort while from another point of view amount to a crime. In the case for instance, of an assault the right violated is that which every man has that his bodily safety shall be respected and for the wrong done to this right the sufferer is entitled to get damages But this is not all The act of violence is a menace to the safety of society generally and will therefore be punished by the State. Where the same wrong is both a crime and a tort (e g assault, libel theft mischief to property) its two aspects are not identical its definition as a crime and as a tort may differ what is a defence to the tort (as in libel the truth) may not be so in the crime and the object and result of a prosecution and of an action are different The wrong doer may be ordered in a civil action to make

[1] *Gladwell* v *Steggall* (1839) 5 Bing N C. 733 8 L. J C. P

sation to the injured party and also punished criminally by imprisonment or fine

Cases may easily be put showing that a transaction may involve a criminal also a tortious element and lastly a breach of contract so that if the criminal element be disregarded a valid right of action *ex delicto* is disclosed and if the tortious ingredient be also rejected a remedy *ex contractu* will remain to the complainant Suppose that a person fraudulently obtains goods under circumstances which would render him liable to be indicted—that he afterwards sells the goods and receives the proceeds of their sale—here the individual who wrongfully possessed himself of the goods would be liable to an indictment for fraud—to an action at suit of the rightful owner for recovery of the goods or their value—or lastly, to an action for the money had and received by the defendant notice of the criminal or tortious ingredients in the particular transaction being waived

To constitute a tort or civil injury first there must be a wrongful act committed by a person secondly the wrongful act must result in legal damage to another [1] and thirdly the wrongful act must be of such a nature as to give rise to a legal remedy in the form of an action for damages.

1 *Wrongful act*

The act complained of should under the circumstances be legally wrongful as regards the party complaining that is, it must prejudicially affect him in some legal right It is not enough if it will however directly do him harm in his interests [2]

An act which *prima facie* appears to be innocent may become tortious if it invades the legal right of another person A familiar instance is the erection on one s own land of anything which obstructs the light to a neighbour's house. It is no doubt lawful to erect what one pleases on one s own land but if by twenty years enjoyment the neighbour has acquired the legal right to the unobstructed transmission of the light across that land the erection of any building which substantially obstructs it is an invasion of the right and so not only does damage but is unlawful and injurious. An act done involuntarily or under the influence of pressing danger which the law presumes to be done involuntarily is not legally wrongful The crucial test of a legally wrongful act or omission is its prejudicial effect on the legal right of another

Now what is a legal right? It has been defined by Austin [3] as a faculty which resides in a determinate party or parties by virtue of a given law and which avails against a party (or parties or answers to a duty lying on a party or parties) other than the party or parties in whom it resides. Rights available against the world at large are very numerous. They are sub-divided into private rights and public rights.

[1] *King v Commissioners of Sewers for Pagham Sussex* (1828) 8 B & C. 355 362

[2] *Rogers v Rajendro Dutt* (1860) 8 M I A. 103 136 13 Moore I C. 209

[3] Vol II p 736

Private rights include all rights which belong to a particular person to the exclusion of the world at large. These rights are (1) rights of reputation (2) rights of bodily safety and freedom (3) rights of property or in other words rights relative to the mind body and estate and, if the general word estate is substituted for property these three rights will be found to embrace all the personal rights that are known to the law [1] Under the third head of rights of property will fall (*a*) those rights and interests, corporeal and incorporeal which are capable of transfer from one to another and (*b*) those collateral rights of a personal nature which enable a person to acquire, enjoy and preserve his private property Thus private property is either property in possession property in action, or property that an individual has a special right to acquire.[2]

Public rights include those rights which belong in common to the members of the State generally Every infringement of a private right denotes that an injury or wrong has been committed which is imputable to a person by whose act omission or forbearance it has resulted But when a public right has been invaded by an act or omission not authorized by law then no action will lie unless in addition to the injury to the public a special peculiar and substantial damage is occasioned to the plaintiff [3] The remedy of the public is by indictment for if every member of the public were allowed to bring action in respect of such invasion there would be no limit to the number of actions which might be brought [4]

To every right there corresponds an obligation or duty If the right is legal so is the obligation if the right is contingent imaginary or moral so is the obligation A right in its main aspect consists in doing something, or receiving and accepting something So an obligation consists in performing some act or in refraining from performing an act A servitude of passage over a field appears as a right of walking or driving over it by the owner of the dominant tenement The duty of the servient owner is to refrain from putting obstacles An easement of light appears as a right on the part of the dominant owner to interdict the erection of buildings on the servient tenement or to remove them when erected The duty is to abstain from erecting them The duty with which the law of torts is concerned is the duty to abstain from wilful injury to respect the property of others and to use due diligence to avoid causing harm to others

Liability for a tort arises therefore when the wrongful act complained of amounts either to an infringement of a legal private right or a breach or violation of a legal duty

[1] Per Cave J in *Allen* v *Flood* [1898] A C 1 29

[2] Per Bayley J in *Hannam* v *Mockett* (1824) 2 B & C 934 937

[3] *Lyon* v *Fishmongers Co* (1876) 1 App Cas 662

[4] *Winterbottom* v *Lord Derby* (1867) L R 2 Ex 316 321 *Iveson* v *Moore* (1699) 1 Ld Raym 486 *Ricket* v *Metropolitan Ry Co* (1864) 5 B & S 149 156 L R 2 H L 175

2 *Legal damage*

It is not every damage that is a damage in the eye of the law There may be a wrong done to a person but if it has not caused him what the law terms actual legal damage there is no tort in respect of which an action is maintainable Legal damage is neither identical with actual damage nor is it necessarily pecuniary Every invasion of a plaintiff's right or unauthorized interference with his property imports legal damage that is although a person injured may not suffer any pecuniary loss by the wrongful act yet if it is shown that there was a violation of some right the law will presume damage

In the leading case of *Ashby* v *White*[1] Lord Holt C J said Every injury imports a damage, though it does not cost the party one farthing and it is impossible to prove the contrary for a damage is not merely pecuniary but an injury imports a damage when a man is thereby hindered of his right As in an action for slanderous words though a man does not lose a penny by reason of the speaking them yet he shall have an action So if a man gives another a cuff on the ear though it costs him nothing no not so much as a little *diachylon* [plaster], yet he shall have his action for it is a personal injury So a man shall have an action against another for riding over his ground though it do him no damage for it is an invasion of his property and the other has no right to come there

The real significance of legal damage is illustrated by two maxims namely *injuria sine damno* and *damnum sine* (or *absque*) *injuria*

By *damnum* is meant damage in the substantial sense of money loss of comfort service health or the like By *injuria* is meant a tortious act it need not be wilful and malicious for though it be accidental if it be tortious an action will lie Any unauthorized interference however trivial with some general right conferred by law on a person is an injury e g the right of excluding others from one's house or garden It is limited to that kind of breach of law which consists in the violation of another's private rights Justinian defines it as every action contrary to law

In cases of injuria sine damno i e the infringement of a legal private right without any actual loss or damage the person whose right is infringed has a cause of action There are two kinds of torts—those which are actionable *per se* that is, without proof of actual damage and those which are actionable only on proof of actual damage resulting from them In the former kind the law presumes damage because certain acts are so likely to result in harm owing to their mischievous tendency that the law prohibits them absolutely whereas in the latter there is no such presumption and actual damage must be proved Whenever a person has sustained what the law calls an injury he may bring an action without being under the necessity of proving special damage because the injury itself is taken

[1] (1703) 2 Ld. Raym. 938 955

[2] *Winsmore* v *Greenbank* (1745) Willes 577 581

[3] *ibid* 320

to imply damage Actual perceptible or appreciable loss or detriment is not indispensable as the foundation of an action Trespass to person that is, assault battery and false imprisonment and trespass to property whether it be land or goods and libel are instances of torts that are actionable *per se* and the Court is bound to award to the plaintiff at least nominal damages if no actual damage is proved

In India the same principles have been followed The Privy Council has observed that there may be where a right is interfered with *injuria sine damno* sufficient to found an action but no action can be maintained where there is neither *damnum* nor *injuria* [1] A violation of a legal right committed knowingly gives rise to a cause of action e.g interference with an exclusive right to weigh goods and produce sold at a bazar [2] or to break a curd pot in a temple on a certain day [3] or interference with a right to carry a procession through certain public streets of a village on specific occasions [4] or to the supply of water from a channel [5]

If there is merely an infringement of a legal right without actual damage, the person whose right has been infringed can bring a suit under the provisions of s 42 of the Specific Relief Act [6]

Leading case—ASHBY *v* WHITE

Refusal to register a vote—In the leading case the defendant a returning officer wrongfully refused to register a duly tendered vote of the plaintiff a legally qualified voter and the candidate for whom the vote was tendered was

[1] *Kali Kishen Tagore* v *Jodoo Lal Mullick* (1879) 5 C L R 97 101 L R. 6 I A. 190 195 It is not necessary to show that there has been any subsequent injury consequent on such infringement see *Ram Chand Chuckerbutty* v *Nuddiar Chand Ghose* (1875) 23 W R. 230 *Ramphul Sahoo* v *Misree Lall* (1875) 24 W R 97 contra *Nabakrishna* v *Collector of Hooghly* (1869) 2 B L R (A C J) 276 *Shama Churn* v *Boidonath* (1869) 11 W R 2 *Seeta Ram* v *Shaikh Kummeer Ali* (1871) 15 W R 250 *Kaliappa* v *Vayapuri* (1865) 2 M H C 442 *Nga Myat Hmwe* *Nga Yi* (1906) U B R. Tort p 9 *Maung Thit Sa* v *Maung Nat* (1922) 1 B L J 146

[2] *Bhikhi Ojha* v *Harakh Kandu* (1889) 9 A W N 89

[3] *Narayan* v *Balkrishna* (1872) 9 B H C (A C J) 413 A person may possess the right to worship an idol at particular places when it is carried in procession or otherwise *Nagiah Bathudu* v *Muthacharry* (1900) 11 M L J 215 *Subbaraya Gurukal* v *Chellappa Mudali* (1881) 4 Mad. 315 *Krishnaswami Aiyangar* v *Rungaswamy Iyengar* (1909) 19 M L J 743 The right of worship including any special right of worship is a civil right *Ankepeti Subba Reddi* v *Tippana Narayana Reddi* (1911) 21 M L J 1027

[4] *Andhi Moopan* v *Muthuveera Reddi* (1915) 29 M L J 91

[5] *Rama Odayan* v *Subramania Aiyar* (1908) 31 Mad 171 following *Quinn* v *Leathem* [1901] A C 495

[6] Act I of 1877 See *The Surat Municipality* v *Chunilal Maneklal* (1906) 8 Bom L R 209 where a suit was brought against the Municipality for the refusal of a receiving officer to accept the nomination paper of the plaintiff as a candidate at a by election Judicial recognition of a stranger s right to possession or anything short of actual disturbance of it by him does not justify a claim to ges but where the title of the is impaired such a claim *Bhavani* v *Anantha Kam* 31 M L J 556

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In India the common principles have been followed. The Privy Council has observed that there may be where a right is interfered with *injuria sine damno* sufficient to found an action but no action can be maintained where there is neither *damnum* nor *injuria*.[1] A violation of a legal right committed knowingly gives rise to a cause of action, e.g. interference with an exclusive right to weigh goods and produce sold at a bazar[2] or to break a curd pot in a temple on a certain day[3] or interference with a right to carry a procession through certain public streets of a village on specific occasions,[4] or to the supply of water from a channel.[5]

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elected and no loss was suffered by the rejection of the vote nevertheless it was held that an action lay [1] In this case the returning officer had acted maliciously Where therefore a returning officer without malice or any improper motive in exercising his judgment honestly refused to receive the vote of a person entitled to vote at an election it was held that no action lay If a person entitled to be upon the electoral roll is wrongfully omitted from such roll so as to be deprived of his right to vote he suffers a legal wrong for which an action lies.[3]

Banker refusing a customer s cheque —An action will lie against a banker having sufficient funds in his hands belonging to a customer for refusing to honour his cheque, although the customer did not thereby sustain any actual loss or damage.[4]

In cases of damnum sine injuria, i e actual and substantial loss without infringement of any legal right no action lies Mere loss in money or money s worth does not of itself constitute legal damage The most terrible harm may be inflicted by one man on another without legal redress being obtainable There are many acts which though harmful are not wrongful and give no right of action *Damnum* may be *absque injuria* Thus if I have a mill and my neighbour sets up another mill and thereby the profits of my mill fall off I cannot bring an action against him and yet I have suffered damage But if a miller hinders the water from running to my mill or causes any other like nuisance I shall have such action as the law gives [5] Acts done by way of self defence against a common enemy such as the erection of banks to prevent the inroads of the sea, removal of support to land where no such right of support has been acquired and damage caused by acts authorized by statute are instances of *damnum absque injuria* and damage resulting therefrom is not actionable. The loss in such cases is not caused by wrong but by another s exercise of his undoubted right and in every complicated society the exercise however legitimate by each member of his particular rights or the discharge however legitimate by each member of his particular duties can hardly fail occasionally to cause conflict of interest which will be detrimental to some Where an act is lawful or legally done without negligence and in the exercise of a legal right such damage as comes to another thereby is damage without injury Hence the meaning of the maxim is that loss or detriment is not a ground of action unless it is the result of a species of wrong of which the law takes cognizance

[1] *Ashby v White* (1703) 2 Ld. Raym. 938.

[2] *Tozer v Child* (1856) 7 El. & Bl. 377 See also *Chunilal Maneklal v Kirpashankar Bhagwanji* (1906) 8 Bom. L. R. 838. Express malice is not necessary If the refusal is not in good faith which implies due care and diligence the person refusing to register the vote will be liable *Draviam Pillai v Cruz Fernande* (1915) 29 M. L. J 701

[3] *Municipal Board of Agra v Ashrafi Lal* (1921) 44 All 202

[4] *Marzetti v Williams* (1830) 1 B & Ad. 415

[5] Per Hankford, J in *Gloucester Grammar School* (1410) Y B 11 Hen. IV fo. 27 pl. 21 23

In certain cases no action will lie unless actual or special damage is proved Where no actual and positive right (apart from the damage done) has been disturbed it is the damage done that is the wrong and the expression special damage in this connection means the actual and temporal loss which has, in fact occurred Such damage is called variously express loss particular damage damage in fact special or particular cause of loss [1] Actual damage is the gist of action in the following cases —(1) right to support of land as between adjacent land-owners, (2) menace (3) seduction (4) slander (except in four cases) (5) deceit (6) conspiracy or confederation (7) waste (8) distress *damage feasant* (9) negligence (10) nuisance consisting of damage to property and (11) actions to procure persons to break their contracts with others In all these cases it may be said that the injury consists in the special damage

Leading case—CHASEMORE v RICHARDS.

Interception of percolating water—In the leading case a landowner and millowner who had for about sixty years enjoyed the use of a stream which was chiefly supplied by percolating underground water had lost the use of the stream after an adjoining owner had dug on his own ground an extensive well for the purpose of supplying water to the inhabitants of the district. In an action brought by the landowner it was held that he had no right of action [2] Where a landowner in carrying on mining operations in his own land in the usual manner drained away the water from the land of another owner through which water flowed in a subterraneous course to his well, it was held that the latter had no right to maintain an action [3]

Where the defendant intended to divert underground water from the spring that supplied the plaintiff corporation s works not for the benefit of his own land but in order to drive the corporation to buy him off it was held that the defendant s conduct was unneighbourly but not malicious and therefore no action lay [4] The rule as to the right of a landowner to appropriate percolating underground water applies equally to brine

Damage caused by lawful working of a mine—Where a landowner by working his mines caused a subsidence of his surface in consequence of which the rainfall was collected and passed by gravitation and percolation into an adjacent lower coal mine it was held that the owner of the latter could sustain no action because the right to work a mine was a right of property which when duly exercised begot no responsibility [6]

Setting up a rival school—Where the defendant a schoolmaster set up a rival school next door to the plaintiff s, and boys from the plaintiff s school

[1] See the three meanings assign d to this expression in the judgment of Bowen L J in *Ratcliffe* v *Evans* [1892] 2 Q B 524 528 See *General and Special Damages* Chapter IX *infra*

[2] *Chasemore* v *Richards* (1859) 7 H L C 349 but see *Babaji* v *Appa* (1923) 25 Bom. L R 789

[3] *Acton* v *Blundell* (1843) 12 M & W 324

[4] *Mayor etc of Bradford* v *Pickles* [1895] A C 587

[5] *The Salt Union Limited* v *Brunner Mond & Co* [1906] 2 K B 822

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"Ashford Lodge" for sixty years and the adjoining house belonging to the defendant was called "Ashford Villa" for forty years. The defendant altered the name of his house to that of the plaintiffs house. The plaintiffs alleged that this act of the defendant had caused them great inconvenience and annoyance and had materially diminished the value of their property. It was held *that the defendant had not violated any legal right of the plaintiffs*.[1]

Indian case.—Ceasing to offer food to an idol.—Where the servants of a Hindu temple had a right to get the food offered to the idol but the person who was under an obligation to the idol to offer food did not do so and the servants brought a suit against him for damages, it was held that the defendant was under no legal obligation to supply food to the temple servants and though the result of his omission to supply food to the idol might involve a loss to the plaintiffs, it was *damnum absque injuria* and could not entitle the plaintiffs to maintain a suit.[2]

The result of the two maxims is that there are moral wrongs for which the law gives no legal remedy though they cause great loss or detriment and on the other hand there are legal wrongs for which the law does give a legal remedy though there be only violation of a private right without actual loss or detriment in the particular case.

3 *Legal remedy*

A tort is a civil injury but all civil injuries are not torts. The wrongful act must come under the category of wrongs for which the remedy is a civil action for damages. The essential remedy for a tort is an action for damages but there are other remedies also, e.g. injunction may be obtained in addition to damages in certain cases of wrongs. Specific restitution of a chattel may be claimed in an action for detention of a chattel. Where there is dispossession of land the plaintiff in addition to damages also claims to recover the land itself. But it is principally the right to damages that brings such wrongful acts within the category of torts. There also exists a large number of unauthorized acts for which a criminal prosecution can alone be instituted.

The difficulty of arriving at a scientific definition of 'tort' has not been surmounted by any writer. This branch of the law is still growing. No definition helped out even by explanation can convey a full conception of its meaning. But the labours of Sir Frederick Pollock have contributed largely to a clearer understanding of the term 'tort'.*

[1] *Day v. Brownrigg* (1878) 10 Ch D 294.

[2] *Dhadphale v. Gurav* (1881) 6 Bom 122. See *Bindachari v. Dracup* (1871) 8 B H C (A C J) 202 (refusal of a pleader to appear in a case under s. 180 Criminal Procedure Code is no injury); see *Dhondu Hari v. Curtis* (1907) 9 Bom. L R J 302; *Rattigan v. The Municipal Committee of Lahore* (1888) P R No 106 of 1888 (erection of a slaughter house near a person's house is no injury if no nuisance); *Shidramappa v. Mahomed Yusaf* (1920) 22 Bom. L R 1107 (erection of a dam to pen back rain water is no injury). The Privy Council has decided similarly in *Gerrard v. Crowe* [1921] A C 395.

* Sir Frederick Pollock thus sums up the normal idea of tort —

Every tort is an act or omi

flocked to defendant s it was held that no action could be maintained[1] Com petition is no ground of action whatever damage it may cause provided nobody s legal rights are infringed.[2]

Driving a rival trader out of market.—A B C and D shipowners who shipped tea from one port to another combined together to drive F a rival shipowner out of the trade by offering special terms to customers who would deal with them to the exclusion of F F sued A B C and D for the loss caused to him by their act It was held that F had no right of action for no legal right of F had been infringed Damage done by competition in trade was not actionable[3]

Refusal of employment—A B and C owned a tug which was employed when necessary for towing ships in charge of Government pilots in the Hooghly A troopship with English troops arrived in the Hooghly The owners asked an exorbitant price for towing up the ship whereupon the Superintendent of Marine issued a general order to officers of the Government pilot service not to employ the tug in future A B and C brought an action against the Superintendent for damages It was held that they had no legal right to have their tug employed by Government and the action was dismissed[4]

Use of title by a spouse after dissolution of marriage—Where the marriage of a commoner with a peer of the realm had been dissolved by decree at the instance of the wife and she afterwards on marrying a commoner continued to use the title she had acquired by her first marriage it was held that she did not thereby though having no legal right to the user commit such legal wrong against her former husband or so affect his enjoyment of the incorporeal hereditament he possessed in his title as to entitle him in the absence of malice to an injunction to restrain her use of the title[5]

Obstruction to the view of a shop—The plaintiff carried on his business in a shop which had a board to indicate the materials in which he dealt The de fendants in virtue of statutory powers erected a gasometer which obstructed the view of his premises In an action by the plaintiff to restrain by injunction the erection of the gasometer as it injured him by obstructing the view of his place of business it was held that no injunction could be granted for the injury com plained of[6]

Misdelivery of telegrams—A sent a telegram to B for the shipment of certain goods. The telegraph company mistaking the registered address of C for that of B delivered the telegram to C C acting on the telegram sent the goods to A A refused to accept the goods stating that he had ordered the goods not from C but from B C sued the telegraph company for damages for the loss suffered by him It was held that C had no cause of action against the com pany for the company did not owe any duty of care to C and no legal right of C could therefore be said to have been infringed.[7]

Using the name of another man s house—The plaintiffs house was called

[1] *Gloucester Grammar School case* (1410) Y B 11 Hen IV fo 27 pl 21 23

[2] *Quinn v Leathem* [1901] A C 495 539

[3] *Mogul Steamship Co v McGregor Gow & Co* [1892] A. C. 25

[4] *Rogers v Rajendro Dutt* (1860) 8 M I A. 103 13 Moore P C 209

[5] *Earl Cowley v Countess Cowley* [1901] A C. 450

[6] *Butt v Imperial Gas Co* (1866) L. R. 2 Ch App 158

[7] *Dickson v Reuters Telegram Company* (1877) 3 C. P D 1 47 L. J C P 1

CHAPTER II

ELEMENTS IN TORT

1 Damage.	3 Intention.
2. Malice	4 Motive

IN the preceding Chapter we have seen that in every tort there must be a wrongful act and legal damage or injury and that every injury imports damage. It is not every damage that is damage in the eye of the law Damage, as understood in ordinary parlance is not actionable without the co-existence of injury though legal damage is And legal damage is merely a legal fiction, for in certain cases it assumes a fictitious loss to have occurred

Damage and damages are not equivalent terms Damages are the compensation, in the form of a sum of money which the Court awards for every injury but the damage which every injury imports is that which is supposed to be compensated by award of damages

Malice — Malice is not a necessary ingredient to the maintenance of an action in tort, where damage is occasioned by a wrongful act that is an act which the law esteems an injury Malice in common acceptation means ill will against a person but in its legal sense it means a wrongful act, done intentionally without just cause or excuse If I give a perfect stranger a blow likely to produce death, I do it of *malice* because I do it *intentionally* and without just cause or excuse. If I maim cattle without knowing whose they are if I poison a fishery without knowing the owner I do it *of malice* because it is a wrongful act and done intentionally [1] The word wrongful imports the infringement of some right i e some right which the law recognizes and exists to protect. Where a man has a right to do an act, it is not possible to make his exercise of such right actionable by alleging or proving that his motive in the exercise was spite or malice in the popular sense.[2] A wrongful act done knowingly and with a view to its injurious consequences may in the sense of law be malicious but such malice derives its es ential character from the circumstance that the act done constitutes a violation of the law [3]

Malice is variously spoken of as express malice actual malice or malice in fact and malice in law or implied malice The first three terms are identical in meaning Malice is thus of two kinds express malice and malice in law Express malice is an act done with ill will towards an individual It is therefore, what is known as malice in the ordinary sense. Malice in law means an act done wrongfully and

[1] Per Bayley J in *Bromage* v *Prosser* (1825) 4 B & C. 247 255

[2] Per Bowen L J in *Mogul Steamship Company* v *McGregor Gow & Co* (1889) 23 Q B D 598 612

[3] Per Lord Watson in *Allen* v *Flood* [1898] A. C. 1

The law of torts is said to be a development of the maxim *ubi jus ibi remedium* (there is no wrong without a remedy) *Jus* signifies here the legal authority to do or to demand something and *remedium* may be defined to be the right of action or the means given by law, for the recovery or assertion of a right. If a man has a right he must of necessity have a means to vindicate and maintain it and a remedy if he is injured in the exercise or enjoyment of it and indeed it is a vain thing to imagine a right without a remedy want of right and want of remedy are reciprocal [1] The maxim does not mean as it is sometimes supposed that there is a legal remedy for every moral or political wrong If this were its meaning it would be manifestly untrue. There is no legal remedy for the breach of a solemn promise not under seal and made without consideration nor for many kinds of verbal slander though each may involve utter ruin nor for oppressive legislation though it may reduce men practically to slavery nor for the worst damage to person and property inflicted by the most unjust and cruel war The maxim means only that legal wrong and legal remedy are correlative terms and it would be more intelligibly and correctly stated if it were reversed so as to stand where there is no legal remedy there is no legal wrong [2]

Again there is in law no right without a remedy and if all remedies for enforcing a right are gone the right has in point of law ceased to exist [3]

(not being merely the breach of a duty arising out of a personal relation or undertaken by contract) which is related in one of the following ways to harm (including interference with an absolute right whether there be measurable actual damage or not) suffered by a determinate person —

(*a*) It may be an act which without lawful justification or excuse is intended by the agent to cause harm and does cause the harm complained of

(*b*) It may be an act in itself contrary to law or an omission of specific legal duty which causes harm not intended by the person so acting or omitting

(*c*) It may be an act violating an absolute right (especially rights of possession or property) and treated as wrongful without regard to the actor s intention or knowledge

(*d*) It may be an act or omission causing harm which the person so acting or omitting did not intend to cause but might and should with due diligence have foreseen and prevented

(*e*) It may in special cases, consist merely in not avoiding or preventing harm which the party was bound absolutely or within limits, to avoid or prevent

The Privy Council has observed The foundation of every action of tort apart from the question of malice is an act wrongful and which may be qualified legally as an injury *Rogers* v *Rajendro Dutt* (1860) 8 M I A 103 131 13 Moore P C 209

[1] Per Holt C J in *Ashby* v *White* (1703) 2 Ld Raym 938 953

[2] Per Stephen J in *Bradlaugh* v *Gossett* (1884) 12 Q B D 271 285

[3] Per Cave, J in *In re Hepburn Ex parte Smith* (1884) 14 Q B D 394 399

imprisonment of the person a battery a trespass on land are instances in which the act may be quite innocent even laudable as to the intention of the doer and yet if any damage even in legal contemplation be the con sequence an action will lie A thing which is not a legal injury or wrong is not made actionable by being done with a bad intent In *Allen* v *Flood*[1] Lord Watson said Although the rule may be otherwise with re gard to crimes the law of England does not take into account motive as constituting an element of civil wrong Any invasion of the civil rights of another person is in itself a legal wrong carrying with it liability to re pair its necessary or natural consequences in so far as these are injurious to the person whose right is infringed whether the motive which prompted it be good bad or indifferent An act which does not amount to a legal injury cannot be actionable because it is done with a bad intent

It is no defence to an action in tort for the wrong doer to plead that he did not intend to cause damage if damage has resulted owing to an act or omission on his part which is actively or passively the effect of his volition. Bodily injury though the consequence of a lawful act or a mere mischance may be a tort and the existence of an evil intention in the mind of the wrong doer is not essential so much so that even a lunatic, much more a drunken person will be civilly answerable for his torts although wholly incapable of design.

Thus we have the maxim Every man is presumed to intend and to know the natural and ordinary consequences of his acts and this presumption is not rebutted merely by the proof that he did not at the time attend to or think of such consequences or hoped or expected that they would not follow Hence the defendant will be liable in every case *for the natural and necessary consequences of his act whether he in fact* contemplated them or not He will be liable also for every consequence which at the time of committing the tort he did in fact contemplate as a probable result of his act. This maxim is now considerably affected by the rule that the defendant will be liable for the consequences which are the direct cause of his act whether he could have reasonably foreseen them or not[3]

Damage due to a balloon descent.—Where the defendant, a balloonist came down in the plaintiff s garden whereby a crowd of people broke into the garden and trod down vegetables and flowers the defendant s descent was considered to be a trespass and he was held liable for the damage done by the balloon and also by the crowd.[4]

For further cases on the question of liability of a person for the consequences of his act see Chapter on Remedies (Ch. IX)

1 [1898] A C 1 92 *Nam Kee* v *Ah Fong* (1934) 13 Ran 175.
2 *Stevenson* v *Newnham* (1853) 13 C B 285 297
3 *Polemis and Furness Withy & Co in re* [1921] 3 K. B 560
4 *Guille* v *Swan* (1822) 19 Johns. 381

without reasonable and probable cause and not as in common parlance an act dictated by angry feeling or vindictive motive[1] Malice in law is implied malice as well as express malice —that is when from the circumstances of the case the law will infer malice But express malice is not necessarily malice in law for instance a prosecution set on foot with the most express malice but with reasonable and probable cause will give no ground for an action to recover damages for malicious prosecution Again malice in law depends upon knowledge malice in fact' upon motive

The decision of the House of Lords in *Allen* v *Flood*[2] has settled that an act not otherwise unlawful cannot generally be made actionable by an averment that it was done with malice or evil motive A malicious motive *per se* does not amount to an *injuria* or legal wrong The root of the principle is that in any legal question malice depends not upon the evil motive which influenced the mind of the actor but upon the illegal character of the act which he contemplated and committed[3] No use of property which will be legal if due to a proper motive can become illegal because it is prompted by a motive which is improper or malicious[4]

A sunk a well on his land and thereby cut off underground water supply from his neighbour B and B s well was dried up It was not unlawful for a land owner to intercept on his own land underground percolating water and prevent it from reaching the land of his neighbour The act did not become unlawful even though his motive in so doing was not to benefit himself but to injure his neighbour A, therefore was not liable to B however improper and malicious his motive might be[5]

A intentionally and without lawful justification induced B s workmen to discontinue their work in breach of their contract with B The procurement of a breach of contract without lawful justification was a tort It was none the less so because it was prompted by a good motive and to do a good turn both to the employer and the workmen A therefore had wronged B[6]

Intention motive —When the doer of an act adverts to a consequence of his act and desires it to follow he is said to intend that consequence It is common knowledge that the thought of man shall not be tried for the devil himself knoweth not the thought of man'[7] The obligation to make reparation for the damage caused by the wrongful act against right or law arises from the fault and not from the intention But a party must be considered in point of law to intend that which he does[8] An

[1] *Stockley* v *Horntidge* (1837) 8 C. & P 11 *The Collector of Sea Customs* v *Punniar Chithambaram* (1876) 1 Mad 89 F.B.

[2] [1898] A. C. 1

[3] Per Lord Watson in *Allen* v *Flood ibid* p 91

[4] *Mayor etc of Bradford* v *Pickles* [1895] A. C. 587

[5] *Ibid*

[6] *Quinn* v *Leathem* [1901] A C 495 *Read* v *Friendly Society of Operative Stonemasons of England Ireland and Wales* [1902] 2 K. B 88 732

[7] Per Brian C. J in Year Book Pasch 17 Edw 4 fol. 2 pl. 2

[8] *R* v *Harvey* (1823) 2 B & C 257 264

public authority putting him in the King's peace.[1] An alien enemy residing in England under the protection of the Crown can maintain an action for suing is but a consequential right of protection.[2]

Indian law.—Alien enemies residing in British India can sue with the permission of the Central Government in the Courts of British India as if they were subjects of His Majesty.[3]

3 At common law a married woman could not sue unless her husband was joined with her as plaintiff. Under the Married Women's Property Act 1882[4] she could sue in tort in all respects as if she were a *feme sole*. The Law Reform (Married Women and Tortfeasors) Act 1935[5] provides similarly.

Actions between spouses.—A wife cannot sue her husband for a tort nor can a husband his wife. The wife may sue her husband for the protection and security of her own separate property[6] but the husband has no such corresponding right against her. Except this no wife or husband can sue the other in tort. Thus she cannot sue him in a civil action for a personal wrong such as assault, libel[7] or injury by negligence. But she may sue him for detention or conversion of her chattels[8] or prevent him from entering into a house given to her absolutely for her separate use by him.[9] The inability in general of the wife to sue her husband for a tort is founded not merely upon a rule of legal procedure necessitating the joinder of the husband as co-plaintiff but upon the principle that husband and wife form in the eye of the law one person. Divorce does not enable the divorced wife to sue her husband for a personal tort committed during coverture.[10] But a wife living apart from her husband under a separation order obtained by virtue of the Summary Jurisdiction (Separation and Maintenance) Acts 1895[11]—1925[12] can maintain an action of libel against him.[13]

A wife cannot sue her husband for his ante-nuptial tort. An unmarried woman who was in a motor car along with a man sustained injuries through that man's negligent driving and it was found necessary to remove her left eye. She brought an action against him claiming damages in respect thereof. Before the trial of the action she married him. It was held that her right of action was not such a thing in action as would become her separate property within the meaning of

1 *The Hoop* (1799) 1 Rob 196 201
2 *Wells* v *Williams* (1795) 1 Salk 46
3 Civil Procedure Code Act V of 1908 s 83
4 45 & 46 Vic. c 75 s. 1 56 & 57 Vic. c 63 s 1
5 25 & 26 Geo V c 30 s 1
6 The Married Women's Property Act 1882 (45 & 46 Vic. c 75) s. 12
7 *Ralston* v *Ralston* [1930] 2 K. B 238
8 *Larner* v *Larner* [1905] 2 K. B 539
9 *Wood* v *Wood* (1871) 19 W R (Eng) 1049
10 *Phillips* v *Barnett* (1876) 1 Q B D 436
11 58 & 59 Vic c 39
12 15 & 16 Geo V c 51
13 *Robinson* v *Robinson* (1897) 1 T L R. 561

CHAPTER III

PERSONAL DISABILITIES

ALL persons are entitled to sue and are liable to be sued in tort This however is a general rule and is subject to several exceptions There are certain persons who cannot sue whilst there are others who cannot be sued in tort owing to personal disability

Who cannot sue

1 Convict	4 Corporation
2. Alien enemy	5 Infant.
3. Married woman.	6 Insolvent.

1 A convict whose sentence is in force and unexpired and who is not lawfully at large under any license cannot sue for an injury to his property or for recovery of a debt [1] By convict is meant any person against whom judgment of death or penal servitude shall have been pronounced on any charge of treason or felony [2] The right to sue for any injury to the property of a convict is vested in the administrator or interim curator as the case may be, during the time that the convict is subject to the operation of the Statute, that is to say until the convict s death bankruptcy or the completion of his term of imprisonment or until he shall have received a royal pardon [3] A felon, who is not a convict as above defined such as one who has been sentenced to a term of imprisonment only may sue for torts to his property

At common law a convict may sue for any personal wrong such as assault or slander and there is nothing to prevent him still from doing so

Indian law —Until 1921 certain offences in India entailed forfeiture of the property of the offender [4] But forfeiture has now been abolished except in three cases (See ss. 126 127 and 169 of the Indian Penal Code.) It would seem that a convict in India may himself sue for torts both to his person and property

2 An alien enemy cannot sue in his own right [5] By an alien enemy is meant a person of enemy nationality or a person residing in enemy territory whatever his nationality [6] He cannot maintain an action unless by virtue of an Order in Council or unless he comes into the British Dominions under a flag of truce, a cartel a pass, or some other act of

[1] The Forfeiture Act, 1870 33 & 34 Vic c. 23 ss. 8 30
[2] *Ibid* s. 6
[3] *Ibid* ss. 10 and 8
[4] Indian Penal Code s. 121.
[5] *De Wahl* v *Braune* (1856) 1 H. & N 178
[6] *Scotland* v *South African Territories* (1917) 33 T L R. 255

A corporation which is created by a statute is subject only to the liabilities which the Legislature intended to impose upon it. The liability must be determined upon a true interpretation of the statute under which it is created[1] A corporation is liable even if it is incorporated for public duties from the discharge of which it derives no profit[2]

A corporation is not liable for any tort of its agents or servants committed in the course of doing an act which is *ultra vires* of the corporation The leading case on the subject is *Poulton* v *London and S W Ry Co*[3] In that case a station master in the employ of the defendant company arrested the plaintiff for refusing to pay the freight for a horse that had been carried on the defendant s railway The railway company had authority under the Act of Parliament to arrest a person who did not pay his fare but none to arrest a person for non payment for the carriage of goods It was held that the railway company was not liable The company having no power itself to arrest for such non payment it could not give the station master any power to do the act The plaintiff s

v *Brown* [1904] A C 423) for acts of misfeasance by its servants (*Green* v *London General Omnibus Co* (1859) 7 C B N S 290) for fraudulently trading in the name of another (*Lawson* v *The Bank of London* (1856) 18 C B 84) for false imprisonment (*Goff* v *Great Northern Railway Company* (1861) 3 El & El 672 *Lambert* v *Great Eastern Railway* [1909] 2 K B 776) for malicious prosecution (*Edwards* v *Midland Railway Co* (1880) 6 Q B D 287 *Cornford* v *Carlton Bank Limited* [1899] 1 Q B 392 [1900] 1 Q B 22 *Rayson* v *South London Tramways Company* [1893] 2 Q B 304 *Mg Kyau Nyun* v *Maubin Municipality* (1925) 4 Burma L J 139 *Chhaganlal* v *Thana Municipality* (1931) 34 Bom L R 143 contra *Stevens* v *Midland Counties Railway Co* (1854) 10 Ex 352 *Henderson* v *The Midland Railway Company* (1871) 24 L T 881 *Abrath* v *North Eastern Railway Co* (1886) 11 App Cas. 247) for fraud (*Mackay* v *Commercial Bank of New Brunswick* (1874) L R 5 P C. 394 *Houldsworth* v *City of Glasgow Bank* (1880) 5 App Cas 317) for distress (*Smith* v *The Birmingham Gas Company* (1834) 1 A & E 256) for trespass (*Maund* v *The Monmouthshire Canal Company* (1842) M & G 452) for assault (*Eastern Counties Railway Co* v *Broom* (1851) 6 Ex 314 *Butler* v *Manchester Sheffield and Lincolnshire Railway Co* (1888) 21 Q B D 207) for conversion (*Yarborough* v *The Bank of England* (1812) 16 East 6) for nuisance (*Borough of Bathurst* v *Macpherson* (1879) 4 App Cas. 256) for negligence (*Gilbert* v *Corporation of Trinity House* (1886) 17 Q B D 795 *The Rhosina Edwards* v *Falmouth Harbour Commis* (1885) 10 P D 131 *Dormont* v *Furness Railway Co* (1883) 11 Q B D 496 *Scott* v *Mayor of Manchester* (1856) 1 H & N 59 *Cowley* v *Mayor etc of Sunderland* (1861) 6 H & N 565 *Mersey Docks Trustees* v *Gibbs* (1864-65) L R. 1 H L 93 *McClelland* v *Manchester Corporation* [1912] 1 K B 118)

A trade union registered under the Trade Union Acts 1871 and 1876 (34 & 35 Vic c 3 and 39 & 40 Vic. c 2) may be sued in its corporate name *Taff Vale Ry* v *Amalgamated Society of Railway Servants* [1901] A C 426 But this decision has been overruled by s 4 of the Trade Disputes Act 1906 (6 Edw VII c. 47) which says that no Court is to entertain any action for tort brought against a trade union or against any members on behalf of themselves and all other members of the union

1 *Mersey Docks Trustees* v *Gibbs* (1864 65) L R. 1 H L. 93 104

2 *Ibid* *The Bearn* [1906] P 48

3 (1867) L. R. 2 Q B 534

the Married Women's Property Act but was barred by the general disability of husband and wife to sue each other for tort [1]

4 Corporation.—*Suits by corporations*.—A corporation may sue for a libel or any other wrong affecting property or business [2] It cannot maintain an action for personal wrong e. g libel charging the corporation with corruption for it is only the individuals and not the corporation in its corporate capacity who can be guilty of such an offence.[3]

An unincorporated association which was not registered as an association at the time of the publication of an alleged libel cannot sue for the libel and it cannot sue after incorporation for the injury alleged to be done to its members before it was incorporated [4]

Suits against corporations.—The existence and extent of the liability of a corporation in actions of tort were at one time a matter of doubt due partly to technical difficulties of procedure and partly to the theoretical difficulty of imputing wrongful acts or intentions to fictitious persons [5] A corporation is a fictitious person and it can act and become liable only through its agents or servants

A corporation is liable for torts committed by its agents or servants to the same extent as a principal is liable for the torts of his agent or an employer for the torts of his servant provided the tort is committed in the course of doing an act which is within the scope of the powers of the corporation It may thus be liable for assault false imprisonment trespass conversion libel or negligence [6] It was thought at one time that a corporation could not be held liable for wrongs involving malice or fraud on the ground that to support an action for such a wrong it must be shown that the wrong doer was actuated by a motive in his mind and that a corporation has no mind [7] But it is now settled that a corporation is liable for wrongs even of malice and fraud A corporation therefore may be sued for malicious prosecution or for deceit [8]

It is also settled that an action for a wrong lies against a corporation where the thing done is within the purpose of the incorporation and it has been done in such a manner as to constitute what would be an actionable wrong if done by a private individual [9]

[1] *Gottliffe* v *Edelston* [1930] 2 K. B 378

[2] *South Hetton Coal Co* v *North Eastern News Association* [1894] 1 Q B 133

[3] *Mayor etc of Manchester* v *Williams* [1891] 1 Q B 94 *Robinson* v *Robinson* (1897) 13 T L. R 564

[4] *Lieut Col Gidney* v *The A I & D E Federation* (1930) 8 Ran 250

[5] Per Lord Bramwell in *Abrath* v *North Eastern Railway Co* (1886) 11 App Cas. 217

[6] *Mersey Docks Trustees* v *Gibbs* (1861 65) L R. 1 H L 93

[7] *Stevens* v *Midland Counties Ry Co* (1854) 10 Ex 352.

[8] *Barwick* v *English Joint Stock Bank* (1867) L R 2 Ex 259 *Citizens Life Assurance Co* v *Brown* [1904] A C 423 *Ahmedabad Municipality* v *Panubhai* (1934) 37 Bom. L R. 468.

[9] A corporation is held liable for libel (*Whitefield* v *South Eastern Railway Company* (1858) El Bl & El 115 *Nevill* v *Fine Arts and General Insurance Company* [1895] 2 Q B 156 *Citizens Life Assurance Company*

vent's property passes to the Official Assignee or Receiver for the benefit of his creditors But a right of action in respect of a tort exclusively to the person reputation or feelings of the insolvent such as an assault or defamation[1] seduction of a servant,[2] remains with the insolvent and the Official Assignee or Receiver cannot intercept the proceeds so far as they are required for the maintenance of the insolvent or his family But where a tort causes injury both to the person and property of the insolvent the right of action will be split and will pass so far as it relates to the property to the Official Assignee or Receiver and will remain in the insolvent so far as it relates to his person

Where the tort affects the banker personally as well as his property then either the cause of action is divided between him and the trustee or they must join together in bringing the action[3]

Who cannot be sued

1 Sovereign
2 Foreign Sovereigns.
3 Ambassadors
4 Public Officials.
5 Infants and lunatics
6 Married Women
7 Trade Unions.

1 The Sovereign.—The person of the King is by law made up of two bodies a natural body subject to infancy infirmity sickness and death and a political body perfect powerful and perpetual[4] These two bodies are inseparably united together so that they may be distinguished but cannot be divided It is an ancient and fundamental principle of the English constitution that the King can do no wrong This maxim means first whatever is exceptionable in the conduct of public affairs is not to be imputed to the King nor is he answerable for it personally to his people for this doctrine would totally destroy that constitutional independence of the Crown and secondly that the prerogative of the Crown extends not to do any injury[5] The King is not liable to be sued civilly or criminally for a supposed wrong That which the sovereign does personally the law presumes will not be wrong that which the sovereign does by command to his servants, cannot be a wrong in the sovereign because if the command is unlawful it is in law no command and the servant is responsible for the unlawful act the same as if there had been no command[6]

The principle of liability of the master for the act of his servant does no apply to the Crown[7]

[1] *Howard* v *Crowther* (1841) 8 M & W 601
[2] *Hodgson* v *Sidney* (1866) L R 1 Ex. 313
[3] *Beckham* v *Drake* (1850) 2 H L C 632
[4] Bagshaw 29
[5] Blackstone Vol I p 246
[6] *Tobin* v *The Queen* (1864) 16 C B (N S) 310 354
[7] *Ross* v *Secretary of State for India in Council* (1913) 37 Mad. 55 *Mata Prasad* v *Secretary of State for India in Council* (1929) 5 Luck. 157

remedy for the illegal arrest in such a case would be against the station master only

A foreign corporation (i e a corporation created by the law of any foreign country) may sue and be sued for a tort just as any other corporation[1]

The liability of the estate of an idol for wrongs committed by its *shebait* (the person in charge of the idol) is analogous to the liability of a corporation

Under the common law public bodies charged with the duty of keeping public roads and bridges in repair and liable to an indictment for breach of this duty were nevertheless not liable to an action for damages at the suit of a person who had suffered injury from their failure to keep the roads and bridges in proper repair Such bodies are not liable to an action in respect of mere non feasance unless the Legislature has shown an intention to impose such liability upon them[3] But they are liable for misfeasance[4]

5 An infant cannot maintain an action for injuries sustained while *en ventre sa mere* A woman, who was with child was injured in a railway accident, and the child when born was found to be deformed The infant claimed £1 030 as damages from the railway company It was held that the infant could not maintain an action[5]

An infant may sue for any wrong done to him He must of course sue by his next friend

6 Insolvent —Liability for a tort committed by an insolvent is not a debt provable in insolvency and is not discharged by insolvency But an insolvent may be sued for a tort committed by him either before or during insolvency and if a decree is obtained against him, the amount awarded is a debt provable in insolvency

As regards torts committed against an insolvent a distinction is to be drawn between torts to the person and torts to property A right of action in respect of a tort resulting in injury exclusively to the insol

[1] *Henriques* v *Dutch West India Company* (1728) 2 Ld Raym. 1532 *Newby* v *Colts Patent Firearms Co* (1872) L. R. 7 Q B 293.

[2] *Raja Pramada Nath Roy* v *Purna Chandra Roy* (1908) 7 C. L. J 514

[3] *Municipality of Pictou* v *Geldert* [1893] A. C 524 followed in *Achratlal Harilal* v *Ahmedabad Municipality* (1905) 6 Bom. L. R. 75 See also *Russell* v *Men of Devon* (1788) 2 T R 667 *Cowley* v *Newmarket Local Board* [1892] A. C 345 *Maguire* v *Corporation of Liverpool* [1905] 1 K. B 767 *McClelland* v *Manchester Corporation* [1912] 1 K. B 118 But the exemption from liability of local bodies on the ground of non feasance is confined to neglect of highways, and does not apply to drainage works carried out by the local bodies for their convenience which they are bound to maintain in a proper state of repairs so that they shall not be a nuisance to the neighbouring owners *Dholka Town Municipality* v *Desaibhai* (1913) 15 Bom. L. R. 1034

[4] *O Brien* v *Waterford Co Council* [1926] 1 I R. 1 9

[5] *Walker* v *Great Northern Railway Company of Ireland* (1890) 28 L. R. Ir 69

agents are not immune from legal liability for any wrongful act—for example, negligently driving a motor car The privilege is the privilege of the sovereign by whom the diplomatic agent is accredited and it may be waived with the sanction of the sovereign or of the official superior of the agent.[1]

This privilege applies even to a British subject accredited to Great Britain by a foreign government as a member of its embassy[2] But in such a case the right of action against him is not non existent but is merely suspended during his term of office After the expiration of his term he may be sued for a cause of action arising during his period of office and the Statute of Limitation does not begin to run in his favour until the expiration of his privilege enables a writ to be served upon him The immunity extends not only to the person of the minister but to his family and suite.

A foreign sovereign or ambassador may waive his privilege but nothing short of appearance in Court will amount to submission to its jurisdiction.

4 Public Officials—The exemption of the sovereign from liability does not extend to his agents and servants Public officers however cannot be sued in their representative capacity for torts committed by them or by their subordinates[3] All the great officers of State are emanations from the Crown. They are delegations by the Crown of its own authority to particular individuals[4] Where an act is done by an officer of Government in the exercise of powers which cannot be lawfully exercised save by the sovereign power no action lies against the Government or the Secretary of State upon the principle of *respondeat superior* A suit may lie against the Government for torts committed by it in connection with a private undertaking or an undertaking not in exercise of sovereign power[5]

Public officials may be sued in their private capacity for torts committed by them on behalf of or with the authority of the Crown or the Government and the order of the Crown is no defence to such action[6]

Public officials are not personally liable for the wrongs of their subordinates unless expressly authorized or ratified by them because the subordinates are not their servants[7] They are both servants of the Crown

[1] *Dickinson* v *Del Solar* [1930] 1 K B 376

[2] *Macartney* v *Garbutt* (1890) 24 Q B D 368.

[3] *Raleigh* v *Goschen* [1898] 1 Ch 73 *Bainbridge* v *Post Master General and Crane* [1906] 1 K B 178

[4] *Gilbert* v *Trinity House Corporation* (1886) 17 Q B D 795

[5] *Secretary of State for India in Council* v *Shreegobinda Chaudhuri* (1932) 59 Cal 1289

[6] *Entick* v *Carrington* (1765) 19 St. Tr 1030 *Raleigh* v *Goschen* [1898] 1 Ch 73 See the Government of India Act 1935 (25 & 26 Geo V c. 2) ss. 306 470 which exempt the Governor General Governors and the Secretary of State from the jurisdiction of Courts unless sanction of His Majesty in Council has been obtained.

[7] *Mersey Docks Trustees* v *Gibbs* (1864 65) L R. 1 H L 93 124

Foreign Sovereigns—English Courts have no jurisdiction over an independent foreign sovereign unless he submits to the jurisdiction of the Court[1] For this purpose all sovereigns are equal The independent sovereign of the smallest State stands on the same footing as the monarch of the greatest No Court can entertain an action against a foreign sovereign for anything done or omitted to be done by him in his public capacity as representative of the nation of which he is the head Even if such a sovereign is a British subject and has exercised his rights as such subject he cannot be made to account for acts of State done by him in his own territory in virtue of his authority as a sovereign[3] As a consequence of the absolute independence of every sovereign authority and of the international comity which induces every sovereign State to respect the independence of every other sovereign State each and every one declines to exercise by means of its Courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other State or over the public property of any State which is destined to its public use, or over the property of any ambassador though such sovereign ambassador or property be within its territory and therefore but for the common agreement subject to its jurisdiction[4]

Native Indian Princes of certain status e g the Gaekwar of Baroda are regarded as foreign ruling princes over whom the Court in England has no jurisdiction[5]

Indian law—Under s 86 of the Civil Procedure Code no Prince or Chief can be sued in a Court of British India without the consent of the Central Government and in the case of a Ruling Chief without the consent of the Crown Representative whether the suit is brought against him in his sovereign capacity or in his private capacity[6]

3 Ambassadors—A public minister duly accredited to the British sovereign by a foreign State is privileged from all liability to be sued in civil actions[7] except in cases in which he submits to or invites the jurisdiction of the local Courts[8] Any writ issued against him is absolutely null and void[9] Diplomatic privilege does not impart immunity from legal liability but only exemption from local jurisdiction Thus diplomatic

[1] *Mighell* v *Sultan of Johore* [1894] 1 Q B 149 *Duff Development Co* v *Kelantan Government* [1924] A. C. 797

[2] *De Haber* v *The Queen of Portugal* *Wadsworth* v *Queen of Spain* (1851) 17 Q B D 171 *Gladstone* v *Ottoman Bank* (1863) 1 H & M. 505

[3] *Duke of Brunswick* v *The King of Hanover* (*King*) (1848) 2 H L. C. 1

[4] *Parlement Belge* (1880) 5 P D 197

[5] *Statham* v *Statham and H H the Gaekwar of Baroda* [1912] P 92

[6] *Narayanan Moothad* v *The Cochin Sircar* (1913) 38 Mad. 635

[7] *Magdalena Steam Navigation Co* v *Martin* (1859) 28 L. J Q B 310 2 E & E 94 *Parlement Belge* (1880) 5 P D 197 *Mighell* v *Sultan of Johore* [1894] 1 Q B 149

[8] *Suarez* v *Suarez* [1917] 2 Ch 131

[9] *In re Republic of Bolivia Exploration Syndicate Ltd* [1914] 1 Ch 139

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[7] *Mersey Docks Trustees* v *Gibbs* (1864 65) L. R. 1 H L 93 124

and there is no relation of master and servant between the superior o and his inferior

An action for tort will not lie against the Air Council[1]

5 Persons who from extreme youth or unsoundness of minc mentally incapable of contriving fraud or malice

Infancy is no bar to an action of tort brought against an infant where intention knowledge malice or some other condition of the of the wrong doer forms an essential ingredient of the wrong ext youth may afford a defence Infants are liable for wrongs of omi as well as for wrongs of commission Thus infants are held liabl assault false imprisonment libel slander[2] seduction, trespass[3] wro detention of goods[4] fraud[5] embezzling money[6] and for nuisances injuries to their neighbours arising from the negligent use and ma ment of their property

An infant cannot take advantage of his own fraud i e he be compelled to specific restitution where that is possible of any he has obtained by deceit nor can he hold other persons liabl acts done on the faith of his false statements which would have duly done if the statement had been true

Although an infant is liable for a tort yet an action grounde contract cannot be changed into an action of tort Thus an infant held not liable for overriding a mare which he had hired[7] or for ob ing money by fraudulently representing that he was of full age[8] o unskilfully driving a motor car and damaging it[9] But where an i hired a mare and was expressly told that she was not fit for leaping she was put to a fence, and in taking it fell upon a stake and wa injured that she died he was held liable[10] For it was just as much a as if he had taken the mare out of the plaintiff's stable without l If it were in the power of a plaintiff to convert that which arises o a contract into a tort there would be an end of that protection w the law affords to infants[11]

Liability of parent —A father is not responsible for the torts o children But the circumstances of a case may be such as to const

[1] *Macken ie Kennedy* v *Air Council* [1927] 2 K B 517

[2] *Hodsman* v *Grissel* Noy 129 *De fries* v *Davis* (1835) 1 Bing N C 692

[3] Bacon

[4] *Mills* v *Graham* (1804) 1 B & P (N R.) 140

[5] *In re Lush s Trusts* (1869) L R 4 Ch App 591

[6] *Bristow* v *Eastman* (1794) Peake N I C. 291 [223]

[7] *Jennings* v *Rundall* (1799) 8 T R. 335

[8] *R Leslie Ltd* v *Sheill* [1914] 3 K B 607 See *Dhanmull* v Chunder (1890) 21 Cal. 265 whe was held that an infant borro money on a mortgage of immov property was not liable although mortgagee based his claim on fraudulent representations of the fant

[9] *Motor House Company Lim* v *Charlie Ba Ket* (1923) 6 Ran

[10] *Burnard* v *Haggis* (1863) 1 B N S 45

[11] Per Lord Kenyon in *Jenning* *Rundall* sup p 336

the child the servant for the time being of the father in which case the father may be liable as a master for the acts neglect and default of his child as when he sends out his son on some business with his cart and horse, and the son causes injury by negligence in driving A father may also be liable for his own personal negligence in allowing his child an opportunity of committing a wrong as when he supplies his son with an air gun or allows him to remain in possession of it after complaints of mischief caused by the use of the gun and the boy afterwards accidentally wounds a person [1]

Lunatic —There is no reported case of an action of tort having been brought against a lunatic. It is however stated that if a lunatic hurts a man he shall be answerable in trespass, though if he kills a man it is not felony [2] and if a lunatic commits a trespass he shall answer it in damages

Lunacy does not give a general charter to commit wrongs But a lunatic like an infant will not be liable for fraud or malice unless the Court be of opinion that he was capable of conceiving such intention Thus lunacy may be a good defence in wrongs based on malice or on some specific intent

A lunatic will be liable for a tort if it is committed by him while in that condition of mind which is essential to liability in a sane person In cases of wrongs of wilful interference with the person property reputation or other rights it will be no defence that the defendant was under an insane delusion Thus a lunatic will be liable for assault trespass conversion etc But if the lunacy is of such a serious nature that the lunatic is incapable of entertaining any intention of doing a particular act he will not be responsible.

A person sane enough to be accountable to the criminal law will probably be liable for any kind of tort

The same principles would apply to the acts of a person in an epileptic fit.

Drunkenness is no excuse for the commission of a crime it will hardly therefore excuse a tort. Every man is presumed to intend the natural consequences of his act It will therefore be presumed that a man knows if he gets drunk he will be likely to commit acts which will produce injuries to other people.

6 At common law as a general rule a married woman is answerable for her wrongful acts including frauds, and she may be sued in respect of such acts jointly with her husband or separately if she survives

[1] *Bebee* v *Sales* (1916) 32 T L R 413
[2] *Weaver* v *Ward* (1616) Hob 134
[3] 15 *Viner's Abr* 140 In an action brought against an innkeeper for loss of a guest s goods, the plea was that he was of non sane memory owing to illness at the time the goods were lost, but it was held bad *Cross* v *Andrews* (1598) 2 *Croke s Rep* 622

him The liability is hers though living with the husband it must be enforced in an action against her and him which to charge him must be brought to a conclusion during their joint lives [1]

The husband strictly speaking was not liable to be sued at all for his wife's tort His only liability was to be sued jointly with her because of the universal rule that the wife during coverture could not be either a sole plaintiff or a sole defendant [2] In the eye of the law she had no property of her own with which she could pay damages For any wrong committed by her she was liable and her husband could not be sued without her neither could she be sued without joining her husband The husband was joined because she could not be sued alone not that her tort was his tort or that he shared to any extent in the guilt of it. A husband who had obtained a divorce was not liable to be joined in an action of tort for a tort committed by his wife during coverture [3]

For torts committed by a woman before marriage her husband was also liable at common law to the full extent of the damages recovered

Under the Married Women's Property Act 1882 [4] a married woman could be sued in tort as if she were a *feme sole* and her husband need not be joined with her as defendant or be made a party to any action or other legal proceeding taken against her and any damages or costs recovered against her in any such action or proceeding were payable out of her separate property This enactment did not affect the common law liability of a husband for his wife's torts during the subsistence of the marriage and consequently a plaintiff could elect whether he would sue the wife alone or join her husband as co-defendant with her [5] Notwithstanding the Married Women's Property Act, a husband was still liable to be sued with his wife for a tort committed by her during coverture unless the tort was directly connected with a contract with her and was the means of enforcing it [6]

In respect of her ante nuptial torts she could be sued alone and sums recovered against her were to be paid out of her separate property But her husband was also liable to the extent of the property which he had obtained through her and he might be sued either jointly with her or alone [7]

[1] Per Willes, J in *Wright* v *Leonard* (1861) 11 C. B N S 258 266 *Earle* v *Kingscote* [1900] 1 Ch 203 207 [1900] 2 Ch. 585 588

[2] Per Vaughan Williams L. J in *Beauchamp in re* [1904] 1 K. B 572 581 A husband is not liable for an act of misappropriation of his wife simply because he allows her to take up service during the course of which she commits misappropriation *Simpson* v *Bachman* (1914) 13 A L J 55

[3] *Capel* v *Powell* (1864) 17 C. B N S 743

[4] 45 & 46 Vic. c. 75 s. 1 (2)

[5] *Seroka* v *Kattenburg* (1886) 17 Q B D 177

[6] *Edwards* v *Porter* [1925] A C. 1

[7] 45 & 46 Vic c 75 ss. 13 14 15

Now under the Law Reform (Married Women and Tortfeasors) Act 1935 a married woman is liable in respect of any tort and is capable of suing and being sued in tort as if she were a *feme sole*[1] The husband of a married woman is not liable by reason only of his being her husband in respect of any tort committed by her whether before or after the marriage and cannot be sued or made a party to any legal proceeding brought, in respect of any such tort A husband and wife however may be jointly liable in respect of any tort[2] The position as between husband and wife is not affected by the Act

Indian law —In India there is also the Married Womens Property Act of 1874 Under this Act a married woman to whom the Act applies may sue or be sued in tort just as a *feme sole* and any damages recovered by her become her separate property and any damages recovered against her are payable out of her separate property (s 7)

The Act, however does not apply to Hindus Buddhists Sikhs Jains and Mahomedans These communities therefore will be governed by their personal law As to married women belonging to the Hindu Sikh and Jain communities it would appear that they can sue and be sued in respect of their eparate property The husband is neither a proper nor a necessary party to the suit. But a married woman belonging to the Burmese Buddhist community holds all property whether acquired by her before or after marriage (save in some rare cases) as a tenant in common with her husband though in different shares according to the mode in which the property is acquired The husband therefore is a necessary party to a suit in respect of such property

It would seem that under the Indian law the husband is not liable for the torts of his wife.

It would also seem that the wife may sue her husband for torts to her separate property and the husband may sue his wife for torts to his property But neither of them can sue the other for assault defama tion or other personal injury

7 Trade Unions —The Hou e of Lords[4] laid down that a trade union though not a corporate body could be sued in an action of tort for the wrongful acts of its officials This led to the passing of the Trade Disputes Act[5] 1906 s 4 of which provides that an action against a trade union or against any members or officials thereof in respect of any tortious act alleged to have been committed by or on behalf of the trade union shall not be entertained by any Court This gives trade unions com plete immunity from actions of torts and from injunctions in respect there

1 25 & 26 Geo V c. 30 s. 1
2 *Ibid* s. 3
3 *Ibid* s. 4 (2) (c)
4 *Taff Vale Ry Co* v *Amalgamated Society of Railway Servants* [1901] A C 426
5 6 Edw VII c 47 In India trade unions are now registered under the Indian Trade Unions Act (XVI of 1926)

of [1] The Trade Disputes and Trade Unions Act 1927 [2] withdrew this protection in the case of a strike declared illegal by that Act which was passed to prevent a general strike similar to that of 1926 being repeated

Indian law—A trade union may be registered under the Indian Trade Unions Act 1926 *or it may not be so registered If it is registered under* the Act it may be sued in its registered name If it is not so registered any one or more of its members may be sued on behalf of all members of the Union see the Code of Civil Procedure Order I rule 8 (1)

A registered trade union and its officers and members are exempted from liability for certain torts It has thus been provided by s 18 of the Act that no suit shall be maintainable against them or any of them in respect of any act done in contemplation or furtherance of a trade dispute to which a member of the trade union was a party on the ground only that such act induces some other person to break a contract of employment or that it is in interference with the trade business or employment of some other person or with the right of some other person to dispose of his capital or labour as he wills

[1] *Vacher & Sons v London Society of Compositors* [1913] A C 107

17 & 18 Geo V c 22 s 1 (4)

CHAPTER IV

FELONIOUS TORTS

THE doctrine of the merger of a tort in felony has a history of its own. In an early case it was declared that there could not be a double proceeding civil and criminal in respect of the same act. The felony it was said drowns the particular offence and private wrong [1] This dictum is the first authority for the notion that the civil *remedy* was merged in the felony In a subsequent case it was laid down that although there was no actual merger it was a condition precedent to the accruing of the cause of action that the public right should have been vindicated by the prosecution of the felon [2] Until 1870 it was practically useless to bring an action, as till then on conviction of felony the felon s property was forfeited to the Crown

In the leading case of *Wells* v *Abrahams* [3] Cockburn C J said Where an injury amounts to an infringement of the civil rights of an individual and at the ame time to a felonious wrong the civil remedy that is the right of redress by action is suspended until the party inflicting the injury has been prosecuted Blackburn J said that there were many dicta of high authority that in such cases it is the duty of the person injured to prosecute for the criminal offence before he can pursue his remedy by action for the private injury and Lush J said he cannot obtain redress by civil action until he has satisfied that requirement. Both these eminent Judges threw great doubt as to the means by which that duty was to be enforced They said that it was no ground for the Judge at the trial to direct a non suit [4] and that the omission to sue could not form the subject of a plea in bar of the action.

In this uncertain state of the law the question was discussed in the case of *Ex parte Ball In re Shepherd* [5] In this case Lord Bramwell severely criticised the rule and pointed out the various difficulties regarding its application

In *Midland Insurance Co* v *Smith* [6] it was observed that in *Ex parte Ball* the doctrine that it was a condition precedent to the enforcing the civil remedy that the felon should have been first prosecuted if it ever had any solid foundation was finally exploded The true principle of the

1 Per Tanfield J in *Higgins* v *Butcher* (1606) Yelv 61 89 Jones, J in *Markham* v *Cobbe* (1625) Noy 82 *Daukes* v *Coveneigh* (1652) Sty 346 Doderidge and Whitelock JJ in *Markham* v *Cobbe* sup *Crosby* v *Leng* (1810) 12 East 409 *Stone* v *Marsh* (1827) 6 B & C 551 *White* v *Spettigue* (1845) 13 M & W 603

2 overruling *Gimson* v *Woodfull* (1825) 2 C & P 41

3 (1872) L. R. 7 Q B 554 557 559 563

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[5] (1879) 10 Ch D 667

[6] (1881) 6 Q B D 561 574

common law is that there is neither a merger of the civil right nor is it a strict condition precedent to such right that there shall have been a prosecution of the felon but that there is a duty imposed upon the injured person not to resort to the prosecution of his private suit to the neglect and exclusion of the vindication of the public law [1]

In *Appleby v Franklin* Wills J held that no action can be maintained for a civil injury resulting to the plaintiff from a felonious act on the part of the defendant, until public justice has been vindicated by a prosecution of the criminal It is equally clear that the objection to the maintenance of the action cannot be raised by plea or by demurrer or as it would seem by way of nonsuit inasmuch as the cause of action still subsists The principle upon which this rule is founded seems to be that the interest of the public requires that the law shall be vindicated before the individual who is wronged shall be permitted to have recourse to a civil remedy [3] The attention of the Court was unfortunately not drawn to the cases of *Ex parte Ball* and *The Midland Insurance Co v Smith*

However it has now been expressly decided that an action for damages based upon a felonious act on the part of the defendant committed against the plaintiff is not maintainable so long as the defendant has not been prosecuted or a reasonable excuse shown for his not having been prosecuted and the proper course for the Court to adopt in such a case is to stay further proceedings in the action until the defendant has been prosecuted [4]

This rule does not apply —

(1) To misdemeanours [5]

(2) Where the plaintiff is not the person injured by the felonious act of the defendant A mother may sue in respect of seduction of her daughter [6]

(3) Where the defendant is some person other than the person guilty of the crime. Stolen goods may be recovered from an innocent receiver even though the thief has not been prosecuted.[7] A master may be sued in respect of felonious tort of his servant.[8]

(4) If the prosecution of the offender has become impossible notwithstanding due diligence on the part of the plaintiff e g death or escape of the felon

(5) To actions brought under the Fatal Accidents Act 1846 as

[1] *Midland Insurance Co v Smith* (1881) 6 Q B D 561 574

[2] (1885) 17 Q B D 93 95

[3] *Appleby v Franklin* (1885) 17 Q B D 93 95

[4] *Smith v Selwyn* [1914] 3 K B 98 *Admiralty Commissioners v Steam ship Amerika* [1917] A C 38 49

[5] *Fissington v Hutchinson* (1866) 15 L T 390

[6] *Appleby v Franklin* sup

[7] *White v Spettigue* (1845) 14 L J Ex. 99 13 M & W 603.

[8] *Osborn v Gillet* (1873) L R 8 Ex 88.

the Act provides that an action will lie although the death shall have been caused under such circumstances as amount in law to felony (s. 1)

Indian law.—(*a*) *Presidency towns.*—The Madras High Court has laid down that a Hindu or a Mahomedan whose civil rights have been infringed by an act which is also a non-compoundable offence is not bound to prosecute the offender before maintaining his civil action nor is his right to prosecute his action suspended until the offender is brought to justice.[1] But the Calcutta High Court has ruled in an old case that where a person brings a suit alleging a state of facts which amounts to felony he must show that he has done his best to procure a conviction on the criminal charge before the civil Court will entertain such a suit.[2]

(*b*) *Mofussil.*—There is no law which requires an injured person in any case to institute criminal proceedings before bringing his action.[3] The failure of an injured party to institute criminal proceedings does not deprive him of his right to bring a suit in a civil Court to recover damages for abuse.[4] Even if a criminal charge against a defendant is dismissed that does not prevent the plaintiff from suing afterwards in a civil Court.[5] It is difficult to reconcile the artificial rule of English law with the provisions of the Civil Procedure Code.[6]

[1] *Abdul Kauder v. Munammad Mera* (1881) 4 Mad. 410

Coonamull v. Sarno Rawr (1867) 2 Ind. Jur N S 187

[3] *Shama Churn Bose v. Bhola Nath Dutt* (1866) 6 W R. (Civ Ref) 9 *Viranna v. Nagayyah* (1881) 3 Mad 6 *Jina v. Jodha* (1863) 1 B H C 1 *Choitunno v. Zumeeroodee* (1872) 18 W R. 27

[4] *Sreenath v. Komul* (1871) 16 W R. 83

[5] *Musst Roopa Bewa v. Ram coomar* (1863) Marsh. 248, 2 Hay 13

[6] See *Keshub Nath Bhattacharya v. Maniruddin Sarkar* (1908) 13 C W N 501 506

CHAPTER V

FOREIGN TORTS

Torts committed abroad have always been triable in English Courts provided they expressly fulfilled the following conditions —

(1) The wrong must be of such a character that it would have been actionable if committed in the country of the forum [1]

(2) The wrong must not have been justifiable by the law of the country where it was committed [2] The term justifiable has reference to legal justification and an act or neglect which is neither actionable nor punishable cannot be said to be otherwise than justifiable within the meaning of the rule [3] It is not necessary that the wrong should have been actionable where committed it is sufficient if it was unlawful

(3) The act complained of must not be a tort of a purely local nature such as a trespass to or ouster from land [4] or a nuisance affecting hereditaments

No action will lie in England for an act committed in a foreign country if it either was lawful by the law of that country at the time of its commission [5] or was excusable or was subsequently legitimatized by virtue of *ex post facto* legislation in such country [6]

Though the act complained of should be wrongful both by the law of England and by the law of the country where it was committed yet it is not necessary that it should involve liability to civil proceedings in the foreign country Unless the act was innocent or justifiable by the law of the foreign country it was immaterial to consider what the remedy might be by the law of that country [7] Again it is no defence to an action for a tort committed in a foreign country that by the law of that country no action lies till the defendant has been dealt with criminally for that is a mere matter of procedure [8]

Leading cases—Phillips v Eyre Mostyn v Fabrigas

Action against a Governor—In the first leading case an action was brought for assault and false imprisonment against the ex Governor of Jamaica The

[1] *The Halley* (1868) L R 2 P C 193 *Carr v Fracis Times & Co* [1920] A. C. 176 *Phillips v Eyre* (1870) L R 6 Q B 1 *McMillan v Canadian Northern Ry Co* [1923] A. C. 120 *Carr v Fracis Times & Co* sup *Govindan Nair v Achutha Menon* (1915) 39 Mad. 433

[2] Per Viscount Cave L. C. in *Walpole v Canadian Northern Railway Co* [1923] A. C. 113 119

[4] *British South Africa Co v The Companhia de Mocambique* [1893] A C. 602

[5] *Blad v Bamfield* (1674) 3 Swan. 604

[6] *Phillips v Eyre* sup *The M Moxham* (1876) 1 P D 107

[7] *Machado v Fontes* [1897] 2 Q B 231

[8] *Scott v Seymour (Lord)* (1862) 1 H & C. 219

trespass complained of having been committed during the rebellion in that island The defendant relied on an Act of Indemnity which the Jamaica Legislature had passed. It was held that legislation though *ex post facto* cured the wrongfulness of his acts and prevented the plaintiffs from recovering [1]

In the second leading case an action was brought against the Governor of Minorca named Mostyn who apparently was of opinion that he was entitled to play the part of an absolute and irresponsible despot on his small stage One of his subjects, however one Fabrigas did not coincide with him in this view and he rendered himself so obnoxious that the Governor after keeping him imprisoned for a week, banished him to Spain For this arbitrary treatment Fabrigas brought an action at Westminster Mostyn objected that as the alleged trespass and false imprisonment had taken place in Minorca the action could not be brought in England. But it was held that as the cause of action was of transitory and not of a local nature it could and £3 000 were given as damages to Fabrigas.

Collision.—*Liability under the Belgian but not under the English law*—By the negligence of a pilot compulsorily taken on board the *Halley* a British steamer in Belgian waters ran down a Norwegian vessel By the Belgian law the Britisher was liable but by the English law the fact that the pilot was on board, and that the collision was due to his negligence exempted her It was held that, under those circumstances, no action lay against her in England.[3]

Seizure of goods under Muscat law—British goods on board a British ship within the territorial waters of Muscat were seized by an officer of the British Navy under the authority of a proclamation issued by the Sultan of Muscat. It was held that the seizure having been shown to be lawful by the law of Muscat no action could be maintained in England by the owner of the goods against the naval officer [4]

Foreign law—In general where certain actions *ex delicto* are held transitory and suits allowed to be maintained in a foreign forum the right of action and the nature and extent of damage must be estimated according to the law of the place where the wrong was committed [5]

As to foreign laws affecting the liability of parties in respect of by gone transactions the law is clear that if the foreign law touches only the remedy or procedure for enforcing the obligation as in the case of an ordinary statute of limitations such law is no bar to an action in this country but if the foreign law extinguishes the right it is a bar in this country equally as if the extinguishment had been by a release of the party or an act of our own Legislature [6]

[1] *Phillips* v *Eyre* (1870) L. R 6 Q B 1

[2] *Mostyn* v *Fabrigas* (1774) 1 Cowp 161

[3] *The Halley* (1868) L. R. 2 P C 193

[4] *Carr* v *Fracis Times & Co* [1902] A C 176

[5] See *Scott* v *Seymour (Lord)* (1862) 1 H & C 219 which lays down that point of procedure must be determined by the *lex fori* and not by the *lex loci*

[6] *Phillips* v *Eyre* sup p 27

CHAPTER VI

JUSTIFICATION OF TORTS

THERE are certain justifications which refer only to a particular wrong or to a small class of wrongs. These are treated in their proper places. But there are other justifications which are common to all kinds of wrongs and to prevent the repetition of these under every wrong they are collectively treated here. Thus in this Chapter are discussed what Sir Frederick Pollock calls the rules of immunity which limit the rules of liability. There are various conditions which when present will prevent an act from being wrongful which in their absence would be a wrong. Under such conditions the act is said to be justified or excused. And when an act is said in general terms to be wrongful it is assumed that no such qualifying condition exists. These justifications from civil liability for acts *prima facie* wrongful are based principally upon public grounds and they are—

1. Acts of State.
2. Judicial acts.
3. Executive acts.
4. Quasi judicial acts.
5. Parental and quasi parental authority.
6. Authorities of necessity.
7. Damage incident to authorized acts.
8. Inevitable accident.
9. Exercise of common rights.
10. Leave and License.
11. Works of necessity.
12. Private defence.
13. Plaintiff a wrong doer.
14. Acts causing slight harm.

1. *Acts of State*

An act of State is an act injurious to the person or to the property of some person who is not at the time of that act a subject of His Majesty which act is done by any representative of His Majesty's authority civil or military and is either previously sanctioned or subsequently ratified by His Majesty.[1] Ratification by the Crown of the act of one of its officers is equivalent to a prior command and may render such act an act of State.[2]

The doctrine as to acts of State can apply only to acts which affect foreigners whether they be in time of war or in time of peace and which are done by the orders or with the ratification of the sovereign. As between the sovereign and his subjects there can be no such thing as an act of

[1] Stephen, 61. See a dissertation on this subject in the *Bombay Law Reporter* Vol. VIII *Journal* p. 6, and also in the *Allahabad Law Journal* Vols. I and II.

[2] *Buron* v. *Denman* (1848) 2 Ex. 167. See *Mir Zufar Ali* v. *Yeshwada Bai* (1872) 9 B. H. C. 314 where a sequestration by the officers of the Government of the private property of the Angria of Colaba was made contrary to the orders of the Court of Directors but was subsequently ratified. See *Ross* v. *The Secretary of State for India* (1913) 37 Mad. 55 as to essentials of ratification.

State in time of peace There can be an act of State as between the sovereign and his subject in time of war Courts of Law are established for the express purpose of limiting public authority in its conduct towards individuals If one British subject puts another to death or destroys his property by the express command of the King the command is no protection of the person who executes it unless it is in itself lawful and it is the duty of the proper Courts of Justice to determine whether it is lawful or not [1] If a wrongful act has been committed against the person or the property of any person the wrong-doer cannot set up as a defence that the act was done by the command of the Crown The Crown can do no wrong and the sovereign cannot be sued in tort but the person who did the act is liable in damages as any private person would be This rule of law has however been held subject to qualification in the case of acts committed abroad against a foreigner If an action be brought in the British Courts in such a case it is open to the defendants to plead that the act was done by the orders of the British Government or that after it had been committed it was adopted by the British Government In any such case the act is regarded as an act of State of which a municipal Court cannot take cognizance. The foreigner who has sustained injury must seek redress against the British Government through his own Government by diplomatic or other means [2]

It is not a good defence to an action of tort brought by a friendly alien resident in the United Kingdom against an officer of the Crown in respect of the wrongful seizure and detention of the alien s property that the seizure and detention have been adopted and ratified by the Crown as an act of State An alien in British territory is normally regarded as a British subject for the time being in virtue of local allegiance and it is for this reason that in dealing with the defence of act of State it is often said that the act must have been abroad as well as against a foreigner in order that the defence should succeed [3]

Although an act of State cannot be challenged controlled or interfered with by municipal Courts its intention and effect may sometimes be to modify and create rights as between the Government and individuals who are about to become subjects of the Government and in such cases the rights arising therefrom may be capable of being adjudicated upon by municipal Courts [4]

The Governor of a colony is not a Viceroy It cannot be assumed that he possesses general sovereign power His authority is derived from his commission and limited to the powers thereby expressly or impliedly entrusted to him It is within the province of municipal Courts to deter

[1] Stephen 65 *Walker v Baird* [1892] A C 491

[2] *Johnstone v Pedlar* [1921] 2 A C 262 272

[3] *Ibid*

[4] *Salaman v Secretary of State for India* [1906] 1 K B 613

mine whether any act of power done by a Governor of a colony is within the limits of his authority and therefore an act of State[1]

A Viceroy however stands on a different footing No proceedings in respect of an act of State can even be commenced against him

Indian law—An act of State in respect of which the jurisdiction of the Courts is barred must be an act which does not purport to be done under colour of a legal title at all and which could neither assert nor violate any right conferable by law but which must rest for its jurisdiction on considerations of external politics and interstatal duties and rights[3] for instance seizure[4] or acquisition[5] of territory by the British Government as a sovereign power or an act done by an agent of Government in his political capacity[6] or an order of the Governor General in Council deposing the ruler of a Native State[7] or a pension granted by Government under a treaty[8]

The acts of State of which municipal Courts in India are debarred from taking cognizance are acts done in the exercise of sovereign powers which do not profess to be justified by municipal law Where an act complained of is professedly done under the sanction of municipal law and in the exercise of powers conferred by the law the fact that it is done by the sovereign power and is not an act which could possibly be done by a private individual does not oust the jurisdiction of civil Court[9] The

[1] *Musgrave* v *Pulido* (1879) 5 App Cas 102

Luby v *Wodehouse* (1865) 17 Ir C L R 618 640 *Sullivan* v *Earl Spencer* (1872) Ir Rep 6 C L R 173 See also *Musgrave* v *Pulido* sup p 112

[3] Per Batty J in *Jehangir* v *Secretary of State* (1903) 6 Bom L R 131 140

[4] *Secretary of State for India* v *Kamachee* (1859) 7 M I A 476 *Sirdar Bhagwan Singh* v *Secretary of State for India* (1874) 2 I A 38. See *East India Co* v *Syed Ally* (1827) 7 M I A 555 where it was held that a resumption by the Madras Government of a Jahagir granted by a Nawab of Carnatic before a treaty made with the East India Company which vested the sovereign rights of the Nawab in the Company and a re grant by the Madras Government to another for life was such an act of sovereign power as precluded the Court from taking cognizance of a suit by the heirs of the original grantee in respect of such resumption See *Salaman* v *The Secretary of State for India* [1906] 1 K B 613 where an action was brought by a trustee in bankruptcy of a residuary legatee of a Maharaja whose property was confiscated by the East India Company and it was held that the acts done by the Company were acts of State

[5] *Vajesingji* v *Secretary of State for India* (1924) 26 Bom L R 1143 1146

[6] *Inhabitants of Mahalingapore* v *Anderson* (1870) 7 Beng L R 452n In this case a suit was unsuccessfully brought against a Political Agent for prohibiting the *guru* of the plaintiffs sect from being conducted into a village and solemnizing marriages.

[7] *In re Maharajah Madhava Singh* (1904) 32 Cal 1 6 Bom. L. R 763 P C

[8] *Nasiruddin* v *Secretary of State* (1935) 37 Bom L R 763

[9] *Secretary of State* v *Hari Bhanji* (1882) 5 Mad 273 In this case the plaintiff successfully sued to recover a sum of money which was illegally exacted from him as an import duty and got a decree But the Calcutta High Court decided in *Nobin Chunder* v *The Secretary of State for India* (1875) 1 Cal 11 which was dissented from in the above case that a person who was the highest bidder at an auction sale for licenses of the sale of Ganja was not entitled to sue the

legality of the Sovereign's acts towards his own subjects can be questioned in civil Courts[1] But the fact that an act of State directed towards a foreign State and done in foreign territory affects indirectly a subject of the State doing the act, does not prevent that act from being an act of State

There are three exceptions in respect of which the Secretary of State for India could be made liable although the acts may be acts of State (*a*) trespass to immovable property (*b*) an obligation imposed by a statute and (*c*) where it can be shown that benefit has resulted to Government from a tort of its servants[3] Under the present constitution such a suit will lie against the Central Government or the Government of a Province or the Secretary of State (where there is Representative of the Crown)

A British Court may inquire into the character of the act of the Governor of a foreign State, and is not bound to accept it as an act of State[4] But it cannot interfere to ascertain the validity of an act done by a Sovereign Prince, e g the appointment of Yuvaraj (heir apparent) by a Raja[5]

The control and authority exercised by the Crown as the para

Government for subsequently refusing to grant him a license or to return his deposit See *Vijaya Ragava* v *Secretary of State for India* (1884) 7 Mad 466 where a suit for damages was brought against the Government by a Municipal Commissioner for wrongful removal from office and it was held that the plaintiff was entitled to damages This case has been doubted in *Ross* v *The Secretary of State for India* (1913) 37 Mad 55 See also *Secretary of State for India* v *Cockcraft* (1914) 39 Mad. 351 *Municipal Corporation of Bombay* v *Secretary of State* (1932) 36 Bom L R 568

[1] *In the matter of Ameer Khan* (1870) 6 Beng L R 392 In this case a person was arrested in Calcutta under a warrant of the Governor General in Council taken into the mofussil and there detained in gaol but such arrest and detainer were held to be not acts of State See *Mills* v *Modee Pestonjee* (1838) 2 M I A 37 where a village having been granted in *inam* by the Peishwa was seized by a Mamlatdar for a debt and on a suit brought by the representatives of the grantee for its possession it was held that the resumption was an act of an individual and not an act of State. See also *Forester* v *Secretary of State for India* (1872) L R I A Sup Vol 10 where the resumption of the lands of a *jagirdar* by the East India Company on his death was held to be not an act of State See to the same effect *Seejan Singh* v *The Secretary of State for India* (1876) P R No 56 of 1876 See also *Ross* v *The Secretary of State for India* sup

[2] *Khembo* v *The Secretary of State* (1908) P R No 105 of 1908 The plaintiffs in this case purchased certain standing trees in Ghond State from the Rana of Ghond. They felled the trees and brought over the timber to Sanjoli a village in the Koti State. The Superintendent of Hill States confiscated the timber under certain rules of the Punjab Government. The plaintiffs sued to recover the timber or its value It was held that the act of the Superintendent having been done in his political capacity in respect of the property of a foreign State in foreign territory was an act of State and as such was not liable to be questioned in a municipal Court in British India

[3] *Municipal Corporation of Bombay* v *Secretary of State* (1932) 36 Bom. L. R. 568 604

[4] *Bombay Burmah Trading Corporation* v *Mir a Mahomed Ali Sheragee* (1873) 10 Beng L. R. 345

[5] *Samarendra Chandra Deb Burman Bara Thakur* v *Birendra Kisl Deb Burman* (1908) 8 C L J 1

mount power over Native States is outside the jurisdiction of municipal Courts[1]

Acts done by high public functionaries—Except with the sanction of His Majesty in Council no proceedings shall lie in any Court in India against the Governor General the Crown Representative, the Governor of a Province and the Secretary of State in respect of anything done or omitted to be done by him in performance of the duties of his office[2] An action of tort can be maintained against the Government or the Secretary of State as the case may be[3] In respect of acts done in exercise of sovereign powers the Government or the Secretary of State would not be liable for the negligence of its or his servants in the course of their employment[4] The Government cannot be held civilly liable for tortious acts committed by officers in the performance of duties imposed upon them by the Legislature[5]

2 *Judicial acts*

Judge—No action lies for acts done or words spoken by a Judge in the exercise of his judicial office although his motive is malicious and the acts or words are not done or spoken in the honest exercise of his office[6] This doctrine has been applied not only to the superior Courts but also to Judges of inferior Courts including the Court of a coroner and a Court martial It is essential in all Courts that the Judges who are appointed to administer the law should be permitted to administer it under the protection of the law independently and freely without favour and without fear This provision of the law is not for the protection or benefit of a malicious or corrupt Judge but for the benefit of the public whose interest it is that the Judges should be at liberty to exercise their functions with independence and without fear of consequences How could a Judge so exercise hi office if he were in daily and hourly fear of an action being brought against him

[1] Tupper Lee Warner See *In re Maharajah Madhava Singh* (1904) 6 Bom L R. 763 32 Cal 1 P C

[2] Government of India Act 1935 (25 & 26 Geo V c 2) ss 306 470 *Jehangir Maneckji v Secretary of State* (1903) 6 Bom L R 131

[3] *Jehangir v Secretary of State* sup *Shivabhajan Durga Prasad v Secretary of State* (1904) 6 Bom L R 65 28 Bom 314 See Civil Procedure Code s 79 as amended by the Government of India (Adaptation of Indian Laws) Order in Council 1937 as to nomenclature of such suits.

[4] *Secretary of State for India v Cockcraft* (1914) 39 Mad 351 In this case the plaintiff sued the Secretary of State for damages in respect of injuries sustained by him in a carriage accident which was alleged to have been due to the negligent stacking of gravel on a military road maintained by the Public Works Department. It was held that the plaintiff had in law no cause of action against the Secretary of State as the maintenance of a military road is one of the functions of Government carried on in the exercise of its sovereign powers and is not an undertaking which might have been carried on only by private persons.

[5] *Evans v The Secretary of State for India* (1919) P R No 143 of 1919 See *Ross v The Secretary of State for India* (1915) 39 Mad. 781

[6] *Anderson v Gorrie* [1895] 1 Q B 668 671 *Ward v Freeman* (1852) 2 Ir C L. R 460

and of having the question submitted to a jury whether a matter on which he had commented judicially was or was not relevant to the case before him [1] The public are deeply interested in this rule which indeed exists for their benefit and was established in order to secure the independence of Judges and prevent their being harassed by vexatious actions [2] The law requires courage in a Judge and therefore provides security for the support of that courage [3] Being free from actions, he may be free in thought and independent in judgment

A judicial officer is not liable to be sued for an adjudication according to the best of his judgment upon a matter within his jurisdiction and a matter of fact so adjudicated by him cannot be put in issue in an action against him [4] Even if the act was outside his jurisdiction the Judge is not liable unless he knew or ought to have known from the facts before him of his want of jurisdiction [5]

In the case of a Judge of a superior Court the plaintiff has to show that he acted without jurisdiction but in the case of a Judge of an inferior Court, the burden of proof lies on the Judge to show that he had jurisdiction [6]

Indian law—Under the Judicial Officers Protection Act no Judge Magistrate Justice of the Peace Collector or other person acting judicially can be sued in any Court for any act done by him in the discharge of his judicial duty whether or not within the limits of his jurisdiction,[7] provided that he at the time in good faith believed himself to have jurisdiction to do the act complained of Similarly no officer of any Court or other person bound to execute the warrants or orders of any such Judge Magistrate Justice of the Peace, Collector or other person acting judicially can be sued in any civil Court for the execution of any warrant or order [8]

This Act protects judicial officers acting judicially and also officers acting under their orders It does not protect judicial officers from being sued in a civil Court except in respect of acts done by them in good faith

[1] Per Kelly C B in *Scott* v *Stansfield* (1868) L R 3 Ex 220

[2] *Fray* v *Blackburn* (1863) 3 B & S 576

[3] *Barnardiston* v *Soame* (1674) 6 How St Tr 1063 1096

[4] *Kemp* v *Neville* (1861) 10 C B N S 523

[5] *Calder* v *Halket* (1840) 3 Moore P C 28 76 *Taffe* v *Downes* (1813) 3 Moore P C 36*n* *Houlden* v *Smith* (1850) 14 Q B 841 *Lowther* v *Radnor (Earl)* (1806) 8 East 113 119 *Gahan* v *Lafitte* (1842) 3 Moore P C 382 *Willis* v *Malachlan* (1876) 1 Ex D 376

[6] *Peacock* v *Bell* (1667) 1 Saund 73 *Carrat* v *Morley* (1841) 1 Q B 18

[7] Jurisdiction rests not on the proof adduced in support of the charge but on the nature of the charge actually made *Girjashankar* v *Gopalji* (1905) 7 Bom L R. 951

[8] Act XVIII of 1850 s 1 See *Sinclair* v *Broughton* (1882) 9 I A 152 *Girjashankar* v *Gopalji* sup See *Moti Lal Ghose* v *Secretary of State* (1905) 9 C W N 495 where a suit was brought against a Magistrate to recover moneys alleged to have been wrongly made over by him under s. 517 of the Code of Criminal Procedure

in the discharge of their judicial functions[1] but not ministerial[2]

If an act done or ordered to be done by a judicial officer in the discharge of his judicial duties is within the limits of his jurisdiction he is protected whether or not he has discharged those duties erroneously irregularly or even illegally or without believing in good faith that he had jurisdiction to do the act complained of If such an act is without the limits of the officer's jurisdiction he is protected if at the time of doing or ordering it he in good faith believed himself to have jurisdiction to do or order it[3]

If a Magistrate fail to act reasonably carefully and circumspectly in the exercise of his duties and if by reason of such failure he do that for which he has not any legal authority he cannot be permitted to say that at the time he thus acted he, in good faith believed himself to have jurisdiction to do the act complained of[4] Wilful abuse of his authority by a Judge—that is wilfully acting beyond his jurisdiction—is a good cause of action by the party who is injured[5]

Members of Naval and Military Court martial and Courts of Inquiry constituted according to military law enjoy the same immunity as Judges[6]

Arbitrators whom the parties by consent have chosen to be their Judges shall never be arraigned more than any other judges[7] Arbitrators, if acting honestly are not liable for errors in judgment or for negligence in the discharge of the duties intrusted to them but they are liable if they have been corrupt[8]

Juryman —An action does not lie against a juryman for a wrong verdict

Coroner —A coroner is a judicial officer No action lies against him

[1] *Venkat* v *Armstrong* (1864) 3 B H C (A C J) 47 *Parankusam* v *Stuart* (1865) 2 M H C 396 *Ragunada Rau* v *Nathamuni* (1871) 6 M H C 423 *Hari* v *Janardan* (1873) 10 B H C 350*n* *Clarke* v *Brajendra Kishore Roy Choudhury* (1912) 39 Cal 953 14 Bom L R 717 P C

[2] *Chunder Narain* v *Brijo Bullub* (1874) 14 Beng L R 254 21 W R 391

[3] *Teven* v *Ram Lal* (1890) 12 All 115 *Meghraj* v *Zakir Hussain* (1876) 1 All 280 *Collector of Sea Customs* v *P Chithambaram* (1876) 1 Mad 89 *Sinclair* v *Broughton* (1882) 9 Cal 341 9 I A. 152 *Halimoo zumah* v *Mun Commis of Hooghly* (1870) 13 W R. 340 *Seshaiyangar* v *R Raghunatha* (1870) 5 M H C. 315 *Collector of Hooghly* v *Taruck Nath* (1871) 16 W R. 63, 7 Beng L R. 449 *Maung Myat Min* v *Maung Wike* (1878) S. J L B 83 *Clarke* v *Brajendra Kishore Roy Choudhury* (1912) 39 Cal 953 14 Bom L R 717 P C

[4] Per Westropp J in *Vinayak* v *Bai Itcha* (1865) 3 B H C (A.C J) 36 46 *Vithoba* v *Corfield* (1855) 3 B H C App 1 *Queen* v *Sahoo* (1869) 11 W R (Cr) 19

[5] *Ammiappa* v *Mahomed* (1865) 2 M H C 443 *Reg* v *Dalsukram*, (1866) 2 B H C. 384 *Pralhad* v *Watt* (1873) 10 B H C. 346 *Calder* v *Halket* (1839) 2 M I A 293

[6] *Scott* v *Stansfield* (1868) L R 3 Ex. 220

[7] Per Lord Holt C J in *Morris* v *Reynolds* (1704) 2 Ld Raym 857

[8] *Wills* v *Maccarmick* (1762) 2 Wils. 148

for any matter done by him in the exercise of his judicial functions [1]

3 *Executive acts*

The orders of a public authority if apparently valid afford a good defence to a tort committed by its officer in executing them [2] e g orders of a Court of Justice [3] It would be wild work if an officer were entitled to scan the warrant delivered to him for the purpose of ascertaining whether under the circumstances of the case it was regular or not [4]

When executive officers are invested with statutory powers of a special and drastic nature they must strictly comply with the provisions of the Act before exercising these powers [5] If a public officer is guilty of misfeasance in the exercise of the powers intrusted to him by law and in the discharge of his duty he is liable to an action for any damage resulting from that act without proof of malice or want of probable cause [6] Alleged authority of an executive department is no justification for a trespass but only those who commit or in fact authorize the trespass are liable An action cannot be maintained against them in their official capacity or as an official body [7]

If an officer arrests the body or takes the goods of a wrong person he is liable. He must seize the right person or property at his peril If he is misled by the party s own act he is not responsible

Police officers are protected in the performance of their executive duties by express legislative enactments in India [8] There are numerous enactments giving immunity to public servants from suits in respect of acts done in performance of their duties If they are acting in the discharge of some duty which the law recognizes then to render them liable the plaintiff must prove dishonest intention and a desire to injure him [9]

A military man cannot maintain an action against his officer for acts done by or under orders from his superiors which they would have a right to give and which he would be bound by military law to obey [10]

4 *Quasi judicial acts*

These are acts of universities colleges committees inns of courts etc No man shall be condemned to consequences resulting from alleged mis

[1] *Garnett* v *Ferrand* (1827) 6 B & C 611
Hill v *Bateman* (1726) 2 Strange 710

[3] *Deus* v *Riley* (1851) 11 C B 434 *Countess of Rutland s case* (1605) 6 Rep 53 6 Coke 52*b*

[4] *Painter* v *Liverpool Gas Co* (1836) 3 A & E 433 449

[5] *Clarke* v *Brojendra Kishore Roy Choudhury* (1909) 36 Cal. 433

[6] *Brasyer* v *Maclean* (1875) L R 6 P C 398

[7] *Raleigh* v *Goschen* [1898] 1 Ch 73

[8] Act V of 1861 s 43 Act II of 1914 s 6 Bombay Act IV of 1890 s 80 Bombay Act IV of 1902 s 140 Mad Act XXIV of 1859 Punjab Act I of 1914 s. 57

[9] *Narasinha Shankar* v *Iman Mahamad* (1903) 5 Bom. L R 667 27 Bom. 590 *Assan Alliar Marai kayar* v *Masilamani Nadar* [1918] M W N 452

[10] *Keighly* v *Bell* (1866) 4 F & F 763 *Marks* v *Frogley* [1898] 1 B 888

conduct unheard and without having the opportunity of making his defence This rule is not confined to the conduct of strictly legal tribunals but is applicable to every tribunal or body of persons invested with authority to adjudicate upon matters involving civil consequences to individuals [1] Persons enjoying quasi judicial powers are protected from civil liability if they observe the rules of natural justice and the particular statutory or conventional rules which may prescribe their course of action The rules of natural justice are that a man cannot be removed from office or membership unless the persons exercising such powers have (1) acted in good faith (2) given him a fair and sufficient notice of his offence and (3) given him an opportunity of defending himself If these conditions are satisfied a Court will not interfere even if it thinks the decision to be wrong The Court has no jurisdiction to vary or to set aside the decision of a domestic tribunal if in giving its decision the tribunal has acted honestly in accordance with its own rules and in good faith even though the rules or decisions are unfair or unjust [3] If the above conditions are not satisfied the act complained of will be declared void and the person affected by it maintained in his rights until the matter has been properly and regularly dealt with [4]

The above principles apply in the case of expulsion of a member from a club or a caste [5]

When a statute gives absolute discretionary powers there is no necessity to show proceedings in the nature of judicial proceedings and a man can be removed from office or the like without showing any cause at all There are however limitations on the exercise of the statutory powers of the domestic Judge viz (1) there must be evidence before the domestic Judge on which he can reasonably find that the ground of dismissal stated in the statute is in fact proved before him (2) the inquiry before the domestic Judge must be conducted in accordance with the principles of natural justice and in particular the accused must be given an opportunity of being heard in his own defence and of cross examining the opposing wit

[1] Per Kelly C B in *Wood v Wood* (1874) L R 9 Ex 190 196 *Daukins v Antrobus* (1881) 17 Ch D 615 *Fisher v Keane* (1878) 11 Ch D 353 362 *Labouchere v Earl of Wharncliffe* (1879) 13 Ch D 346 *Dean v Bennett* (1870) L R 6 Ch 489 *Allbutt v General Council of Medical Education and Registration* (1889) 23 Q B D 400 *Partridge v General Council of Medical Education and Registration of the United Kingdom* (1890) 25 Q B D 90 *Baird v Wells* (1890) 44 Ch D 661 *Fisher v Jackson* [1891] 2 Ch 84 See *The Advocate General of Bombay v David Haim Devaker* (1886) 11 Bom. 185 *Mohamed Kalimuddin v Steuart* (1920) 47 Cal 623

[3] *Maclean v The Workers Union* [1929] 1 Ch 602

[4] *Fisher v Keane* (1879) 11 Ch D 353 See *Abdul Razak* v *Adam Usman* (1935) 37 Bom L R 603 as to wrongful expulsion from a Jamat

[5] *Ratansey v Meghji* (1934) 36 Bom L R 901 *Ramji v Naranji* (1934) 37 Bom L R 261 *Devchand v Ghanashyam* (1935) 37 Bom L R 417 *Appaya v Padappa* (1898) 23 Bom 122 *Jagannath Churn v Akali Dassia* (1893) 21 Cal 463 *Krishnasami v Virasami* (1886) 10 Mad 133

nesses and also of calling his own evidence and (3) the decision must not be based on purely capricious grounds [1]

Public authorities even acting within the defined limits of their powers must not conduct themselves arbitrarily or tyrannically If they are manifestly abusing their powers the Court will interfere [2]

Expulsion from a club—The plaintiff a member of a club sent a pamphlet which reflected on the conduct of S another member of the club to S enclosed in an envelope on the outside of which was printed Dishonourable conduct of S The committee being of opinion that this action was injurious to the character and interests of the club called upon the plaintiff for an explanation which he refused to give They then called on him to resign and as he did not comply with their recommendation they duly summoned a general meeting at which a resolution was passed by the requisite majority expelling the plaintiff from the club It was held that the Court would not interfere to restrain the committee from excluding the plaintiff from the club [3]

Where a member of a society had used menacing language towards another member of the society and for this a majority of a general meeting of the society voted that he should no longer be considered a member of the society but did not give him any notice of the intention to take his conduct into consideration or any opportunity of making his defence it was held that this expulsion was invalid and that he was still a member of the society [4]

Expulsion from caste—The plaintiff was a member of a caste the members of which resolved that those members of the caste who followed a particular religion should be excommunicated The plaintiff was excommunicated from the caste for following that religion It was held that the caste had jurisdiction to act in the manner it had done and the proceedings were in order [5]

5 *Parental and quasi parental authority*

Parents or persons *in loco parentis* may for the purpose of correcting what is evil in the child inflict moderate and reasonable corporal punishment always however with this condition that it is moderate and reasonable [6]

The authority of a schoolmaster is while it exists the same as that of a parent A parent when he places his child with a schoolmaster delegates to him all his own authority so far as it is necessary for the welfare

[1] *Manekji* v *Municipal Commissioner of Bombay* (1929) 32 Bom L R 463

[2] *Nagar Valab* v *Municipality of Dhandhuka* (1887) 12 Bom 490 495

[3] *Dawkins* v *Antrobus* (1881) 17 Ch D 615

[4] *Innes* v *Wylie* (1844) 1 C & K 257 The meeting of a club at which a member is expelled must be a properly constituted meeting Every member must have notice of summons to the meeting *Young* v *Ladies Imperial Club Ltd* [1920] 2 K B 523 If a member is given no opportunity to defend himself on a charge for which he is expelled his expulsion will be illegal *Compertz* v *Goldingham* (1886) 9 Mad. 319 *Deechand* v *Ghanashyam* (1935) 37 Bom L R 417

[6] *R* v *Hopley* (1860) 2 F & F 202 206 *Winterburn* v *Brooks* (1846) 2 C & K 16

of the child[1] The master can therefore inflict a moderate chastisement on his pupil or apprentice[2] e g couple of smacks on the cheek[3] This authority is not limited to offences committed by the pupil upon the premises of the school but may extend to acts done by such pupil while on the way to and from school[4]

At a school for boys there was a rule prohibiting smoking by pupils whether in the school or in public A pupil after returning home smoked a cigarette in a public street and next day the schoolmaster administered to him five strokes with a cane. It was held that the father of the boy by sending him to the school authorized the schoolmaster to administer reasonable punishment to the boy for breach of a school rule and that the punishment administered was reasonable.[5]

6 *Authorities of necessity*

The master of a vessel on the high seas or in a foreign port has disciplinary powers not only over the crew but the passengers also Such powers are based upon necessity and are limited to the preservation of necessary discipline and the safety of the ship[6] The authority of the captain to inflict moderate punishment is not confined to a case where the vessel is at sea beyond the reach of assistance[7]

7 *Damage incident to authorized acts*

If the Legislature authorizes the doing of an act (which if unauthorized would be a wrong) no action can be maintained for that act on the ground that no Court can treat that as a wrong which the Legislature has authorized and consequently the person who has sustained a loss by the doing of that act is without remedy unless so far as the Legislature has thought it proper to provide for compensation to him No action lies for what is *damnum sine injuria* the remedy is to apply for compensation under the provision of the statutes legalizing what would otherwise be a wrong The principle is that the act is not wrongful not because it is for a public purpose but because it is authorized by the Legislature[8] If no compensation is given, that affords a reason though not a conclusive one for thinking that the intention of the Legislature was not that the thing should be done at all events but only that it should be done, if it could be done,

[1] Per Cockburn C J in *Fitzgerald v Northcote* (1865) 4 F & F 656 689

[2] *Penn v Ward* (1835) 2 Cr M & R 338

[3] *Sankunni v Swaminatha Pattar* (1922) 45 Mad. 548.

[4] *Cleary v Booth* [1893] 1 Q B 465 See *Hunter v Johnson* (1884) 13 Q B D 225 But a music master of a cathedral is not justified in even moderately beating a chorister for singing at a catch club though such singing might be injurious to his performing in the cathedral *Newman v Bennett* (1819) 2 Chit. 195

[5] *Rex v Newport (Salop) Justices Ex parte Wright* [1929] 2 K B 416

[6] *Aldworth v Stewart* (1866) 4 F & F 957

[7] *Lamb v Burnett* (1831) 1 Cr & J 291

[8] Per Blackburn J in *Mersey Docks Trustees v Gibbs* (1865) L R 1 H L 93 112 *Hammersmith Rly v Brand* (1869) L. R 4 H L. 171 *East Fremantle Corporation v Annois* [1902] A C 213

without injury to others.[1] But the powers conferred by the Legislature should be exercised with judgment and caution so that no unnecessary damage be done.[3] If the damage could have been prevented by the reasonable exercise of the powers conferred an action can be maintained.[4]

Where the terms of a statute are not imperative, but permissive the fair inference is that the Legislature intended that the discretion as to the use of general powers thereby conferred should be exercised in strict conformity with private rights. On those who seek to establish that the Legislature intended to take away the private rights of individuals lies the burden of showing that such an intention appears by express words or necessary implication.[6]

Even when a particular thing is required to be done the burden of proof is on the person who has to do it to show that it cannot be done without creating a nuisance.

A person seeking the protection of an Act cannot claim that his conduct has any relation to the execution of the Act if he knowingly and intentionally acts in contravention of its provisions.[7]

The defence of statutory authority plays an important part in actions of nuisance.

Damage caused by sparks from an engine.—A railway company authorized by the Legislature to use locomotive engines was held not responsible for

[1] Per Lord Blackburn in *Metropolitan Asylum District* v *Hill* (1881) 6 App Cas. 193 203. See *Suratee Bara Bazaar Co Ltd* v *Municipal Corporation of Rangoon* (1927) 5 Ran 722 where the whole case law is discussed. In this case a statute imposed a duty on a Municipal Corporation to erect urinals and water closets for public use and the Corporation selected a site for the purpose. It was held that as the Corporation had acted *bona fide* in the selection of the locality for a public latrine there was no case for an injunction as the latrine was not erected and had not become an actual nuisance by misuse or mismanagement which the Corporation was bound to prevent. See *Nirmal Chandra Sanyal* v *Pabna Municipality* [1937] 1 Cal 407 where a corporation causing public hackney carriage stand to be erected on any street under a statute was held not liable even if the stand became a source of nuisance to neighbours.

[2] *L & N W Ry* v *Bradley* (1851) 3 Mac & G 336 341. *Foukar Bros & Co* v *Rangoon Mun Com* (1897) 3 Burma L R. 12. *Bhogilal* v *Ahmedabad Municipality* (1901) 3 Bom L R 415. *Municipal Com of Delhi* v *Har Parshad* (1892) P R. No 103 of 1892.

[3] *Mersey Docks Trustees* v *Gibbs* (1865) L R 1 H L 93. *Geddes* v *Proprietors of Bann Reservoir* (1878) 3 App Cas 430.

[4] *H H The Gaikwar* v *Ghandhi Katcharabhai* (1900) 2 Bom. L. R. 357. *Bhogilal* v *Ahmedabad Municipality* sup. *Rup Lal Singh* v *Secretary of State for India* (1925) 7 P L T 463.

[5] Per Lord Watson in *Metropolitan Asylum District* v *Hill* (1881) 6 App Cas. 193 213. *Canadian Pacific Ry* v *Parke* [1899] A. C 535. See the judgment of Bowen L J in *Truman* v *L B & S C Ry* (1885) 29 Ch. D 89 108.

[6] Per Lord Blackburn in *Metropolitan Asylum District* v *Hill* sup p 208.

[7] *Runchordas* v *Municipal Commissioner of Bombay* (1901) 3 Bom. L. R 158 25 Bom. 387. The procedure laid down in a statute must be adhered to strictly. *Clarke* v *Brojendra Kishore Roy* (1909) 36 Cal 433. See *Brindabun* v *Municipal Commissioner of Serampore* (1873) 19 W. R. 309.

damage to plaintiff's plantations from fire occasioned by sparks emitted from an engine as it had adopted every precaution which science could suggest to prevent injury [1] But where the defendant was possessed of a steam traction engine and while it was being driven by his servants along a highway some sparks escaping from it set fire to a stack of hay of the plaintiffs standing on a neighbouring farm and there was no negligence in the construction or management of the engine it was held that he was liable [2]

Indian case—On the track of a railway dry grass two feet high was standing on the land between the rails and the fencing across the fencing was the plaintiff's land on which grass six feet high was standing close up to the fencing The grass on the railway land caught fire either from sparks from an engine or from live cinders falling from the engine and it spread out to plaintiff's land burning down grass hay stacks and some trees It was held that there was negligence on the part of the railway in allowing the grass to remain but the plaintiff was guilty of contributory negligence in not cutting that part of the grass which was in the vicinity of the fencing though he was cognisant of the risk of the railway grass catching fire from sparks or live cinders [3]

Nuisance—*Noise*—In an action by occupiers of houses near a railway company's station for noises and annoyance caused by cattle and drovers on the company's land it was held that the company was authorized to do what they did and were not bound to choose a site more convenient to other persons and that the adjoining occupiers were not entitled to an injunction to restrain the company [4] But a railway company cannot build workshops so situated as to cause a nuisance to a neighbour [5]

Erection of a small pox hospital— If the Legislature prescribe that a public body shall provide hospital accommodation no injunction could issue provided it were proved that the directions in the Act could not be complied with at all without creating a nuisance Where the directions of the Legislature were not imperative a District Board was held not entitled to set up a statute authorizing a small pox hospital so as to prevent an injunction issuing to restrain the Board from establishing a hospital [6] But the establishment of a small pox hospital properly conducted is not of itself necessarily such a serious source of danger to persons resident working or passing by in its immediate vicinity as to constitute a nuisance [7]

Damage to pipes under highways by a steam roller—A gas company had statutory powers to place mains and pipes under certain highways within the

[1] *Vaughan* v *Taff Vale Ry* (1860) 5 H & N 679 *R* v *Pease* (1832) 4 B & Ad 30 See *Halford* v *East Indian Ry* (1871) 14 Beng L R 1 to the same effect

[2] *Powell* v *Fall* (1880) 5 Q B D 597 Bramwell L J in his judgment says that *R* v *Pease* and *Vaughan* v *Taff Vale Ry* are wrongly decided but see *contra* the judgment of Lord Chelmsford in *Hammersmith Ry* v *Brand* (1869) L R 4 H L 202 *Powell* v *Fall* was followed in *Guntur* v *James* (1908) 24 T L R 868 where the facts were identical with that case

[3] *Bombay Baroda and Central India Railway* v *Dwarka Nath* (1935) 58 All 771

[4] *L B & S C Ry* v *Truman* (1885) 11 App Cas 145

[5] *Rajmohan Bose* v *E I Ry* (1872) 10 Beng L R 241

[6] *Metropolitan Asylum District* v *Hill* (1881) 6 App Cas 193

[7] *Att Gen* v *Corporation of Nottingham* [1901] 1 Ch 673 *Att Gen* v *Rathmines & Pembroke Joint Hospital Board* [1904] 1 I R 161

jurisdiction of the defendants who were by virtue of a statute bound to repair the highways. The defendants began to use steam rollers of considerable weight for the purpose of repairing the highways and thereby fractured pipes belonging to th company laid under the highways It was held that the company was entitled to an injunction restraining the defendants from using such rollers [1]

8 *Inevitable accident*

An inevitable accident or unavoidable accident is that which could not possibly be prevented by the exercise of ordinary care caution and skill It means an accident physically unavoidable It does not apply to anything which either party might have avoided [3]

All causes of inevitable accident may be divided into two classes (1) those which are occasioned by the elementary forces of nature unconnected with the agency of man or other cause and (2) those which have their origin either in the whole or in part in the agency of man whether in acts of commission or omission non feasance or of misfeasance or in any other causes independent of the agency of natural forces The term act of God is applicable to the former class [4]

If in the prosecution of a lawful act an accident which is purely so arises no action can be sustained for an injury arising therefrom [5] In order to constitute an inevitable accident it is necessary that the accident should not have been capable of being prevented by ordinary skill and diligence—not extraordinary skill or extraordinary diligence—by that degree of diligence and skill which is generally to be found in persons who properly discharge their duty [6] If a man carries fire-arms or drives a horse his duty is merely to use reasonable care not to do harm to others thereby and if notwithstanding the use of such care an accident happens he may plead that it was due to inevitable accident People must guard against reasonable probabilities but they are not bound to guard again t fantastic possibilities [7]

Damage caused by an explosive substance —The defendants a firm of carrier received a wooden case to be carried to its destination and its contents were not communicated On an intermediate station it was found that the contents were l aking The case was therefore taken to the defendants offices which they had rented from the plaintiff and a servant of the defendants pro-

1 *Gas Light and Coke Co* v *The Vestry of St Mary Abbots Kensington* (1885) 15 Q B D 1 See *Mayor & Corporation of Chichester* v *Foster* [1906] 1 K B 167

2 *The Marlesta* (1872) L R 4 P C 212 *The Merchant Prince* [1892] P 179 *The Sekhan* [1893] P 419 432 434

3 *Saner* v *Bilton* (1878) 7 Ch D 815 *Manchester Bonded Warehouse Co* v *Carr* (1880) 5 C P D 507

4 *Nugent* v *Smith* (1876) 1 C P D 423 435 *Forward* v *Pittard* (1785) 1 T R 27

5 *Davis* v *Saunders* (1770) 2 Chit 639 *Holmes* v *Mather* (1875) L R 10 Ex 261 *Stanley* v *Powell* [1891] 1 Q B 86

6 *The Thomas Powell* v *The Cuba* (1866) 14 L T 603 *The Calcutta* (1870) 21 L T 768 See *Sievert* v *Kamma* (1891) P R No 3 of 1891 where a servant was held not liable for breaking a lamp

7 Per Lord Dunedin in *F* v *Harcourt Rivington* (1932) 146 T 391 392

ceeded to open the case for examination but the nitro-glycerine which it contained exploded all the persons present were killed and the building was damaged. An action was brought by the landlord for damage suffered by parts of the building let to other tenants as well as to the defendants. The defendants admitted their liability for waste as to the premises occupied by them but disputed it as to the rest of the building It was held that in the first place the defendants were not bound to know in the absence of reasonable ground of suspicion the contents of packages offered them for carriage, and next that, without such knowledge in fact and without negligence they were not liable for damage caused by the accident[1]

Injury to a person's eye—The plaintiff's and the defendant's dogs were fighting the defendant was beating them in order to separate them and the plaintiff was looking on The defendant accidentally hit the plaintiff in the eye causing him a severe injury In an action brought by the plaintiff it was held that the action of the defendant was a lawful and proper act in itself which he might do by proper and safe means and that if in doing this act he accidentally hit the plaintiff in the eye and wounded him it was the result of pure accident and therefore no action would lie[2]

The defendant parked his saloon motor-car in a street and left his dog inside. The dog had always been quiet and docile. As the plaintiff was walking past the car the dog which had been barking and jumping about in the car smashed a glass panel and a splinter entered the plaintiff's left eye which had to be removed In an action for damages it was held that the plaintiff could not recover as a motor car with a dog in it was not a thing which was dangerous in itself and as the accident was so unlikely there was no negligence in not taking precautions against it[3]

Injury by runaway horses—The defendant's horses while being driven by his servant in public highway ran away by the barking of a dog and became so unmanageable that the servant could not stop them but could to some extent, guide them While unsuccessfully trying to turn a corner safely the servant guided them so that without his intending it they knocked down and injured the plaintiff who was in the highway It was held that no action was maintainable by the plaintiffs for the servant had done his best under the circumstances.[4]

Injury by a pellet—The defendant who was one of a shooting party fired at a pheasant One of the pellets from his gun glanced off the bough of a tree and accidentally wounded the plaintiff who was engaged in carrying cartridges and game for the party It was held that the defendant was not liable.[5]

9 *Exercise of common rights*

The exercise of ordinary rights for a lawful purpose and in a lawful manner is no wrong even if it causes damage. It is in reference to such cases that we meet with the phrase *damnum sine injuria* *Prima*

[1] *Nitro Glycerine* case (1872) 15 Wallace 524
[2] *Brown* v *Kendall* (1850) 6 Cussing 292
[3] *Fardon* v *Harcourt Rivington* (1932) 48 T L R 215
[4] *Homes* v *Mather* (1875) L R 10 Ex. 261 267 *Wakeman* v *Robinson* (1823) 1 Bing 213
[5] *Stanley* v *Powell* [1891] 1 Q B 86

facie it is the privilege of a trader in a free country in all matters not contrary to law to regulate his own mode of carrying on his trade according to his own discretion and choice.[1] Competition with all its drawbacks, not only between individuals but between associations and between them and individuals is permissible provided nobody s rights are infringed Fair competition is in itself no ground of action whatever damage it may cause Right of competition exists even when the means adopted are unfair Underselling is not a wrong though the seller may sell some article at unremunerative prices to attract customers nor is it a wrong to offer advantages to customers who will deal with a trading company to the exclusion of its rival[4]

Again, everyone may innocently enjoy his own property as he will And the right is the same whatever one s motive may be whether malicious or otherwise No use of property which would be legal if due to a proper motive, can become illegal because it is prompted by a motive which is improper or even malicious[5] For instance, the disturbance or removal of the soil in a man s own land though it is the means (by percolation) of drying up his neighbour s spring or well does not constitute the invasion of a legal right and will not sustain an action[6]

10 *Leave and Licence*— Volenti non fit injuria

Harm suffered voluntarily does not constitute a legal injury and is not actionable. This principle is embodied in the maxim *volenti non fit injuria* (where the sufferer is willing no injury is done) A man cannot complain of harm to the chances of which he has exposed himself with knowledge and of his free will The maxim *volenti non fit injuria* is founded on good sense and justice One who has invited or assented to an act being done towards him cannot when he suffers from it complain of it as a wrong The maxim applies in the first place to intentional acts which would otherwise be tortious A trespasser having knowledge that there are spring guns in a wood although he may be ignorant of the particular spots where they are placed cannot maintain an action for an injury received in consequence of his accidentally treading on the latent wire communicating with the gun, and thereby letting it off[7] For he voluntarily exposes himself to the mischief which has happened But a person who

[1] *Hilton* v *Eckersley* (1855) 6 E & B 47 74 75

Per Lord Lindley in *Quinn* v *Leathem* [1901] A. C 495 539

[3] *Gloucester Grammar School* (1411) 11 Hen IV, 47

[4] *Mogul Steamship Co* v *McGregor Gow & Co* [1892] A. C. 25

[5] Per Lord Watson in *Mayor etc of Bradford* v *Pickles* [1895] A C. 587

[6] *Ballacorkish Silver etc Mining Co* v *Harrison* (1873) L. R. 5 P C. 49 61 See *Chasemore* v *Richards* (1859) 7 H. L C 349 *Acton* v *Blundell* (1843) 12 M & W 324 *Baird* v *Williamson* (1863) 15 C B N S 376 *Smith* v *Kenrick* (1849) 7 C B 515

[7] *Ilott* v *Wilkes* (1820) 3 B & Ald 304 As a result of thi case setting spring guns except by night was made an offence by 7 & 8 Geo IV c. 18 which is repealed and re-enacted by 24 & 25 Vic. c. 95

climbs over a wall in pursuit of a stray fowl and is shot by a spring gun set without notice, can recover damages[1]

The perfectly sound principle underlying this maxim is daily illustrated in common life. It protects the surgeon who amputates a limb; the football player boxer or fencer so long as they play fairly according to the rules of the game and it prevents a person who chooses to pay a debt barred by the Statute of Limitations or not enforceable by reason of infancy from getting his money back[2]

The maxim applies in the second place, to consent to run the risk of harm which would otherwise be actionable Thus the master is not liable for injury done to a servant who has undertaken service knowing the risks incidental thereto The maxim, be it observed is not *scienti non fit injuria* but *volenti* Knowledge is not a conclusive defence in itself *But when it is a knowledge under circumstances that leave no* inference open but one namely that the risk has been voluntarily encountered the defence is complete[3] The question in each case must be, not simply whether the plaintiff knew of the risk but whether the circumstances are such as necessarily to lead to the conclusion that the whole risk was voluntarily incurred by the plaintiff[4] It is necessary to prove that the person injured knew of the risk and voluntarily took it[5]

There are certain limitations to the application of this maxim—

(1) No consent—no leave or licence—can legalise an unlawful act e g fighting with naked fists, a kicking match or a duel with sharp swords

(2) The maxim has no validity against an action based on a breach of statutory duty[6] Thus it is no answer to a claim made by a workman against his employer for injury caused through a breach by the employer of a duty imposed upon him by a statute[7]

(3) *Rescuing*—The maxim does not apply where the plaintiff has under an exigency caused by the defendant s wrongful misconduct consciously and deliberately *faced a risk even of death to rescue another* from imminent danger of personal injury or death whether the person endangered is one to whom he owes a duty of protection as a member of his family or is a mere stranger to whom he owes no such special duty[8] This principle which has been based upon a weight of author

[1] *Bird* v *Holbrook* (1828) 4 Bing 628

[2] *Bize* v *Dickson* (1786) 1 T R. 285 287

[3] Per Bowen L. J in *Thomas* v *Quartermaine* (1887) 18 Q B D 685 696 697

[4] Per Lindley L J in *Yarmouth* v *France* (1887) 19 Q B D 647 660

[5] *Osborne* v *London and North Western Ry Co* (1888) 21 Q B D 220 223 224 *Letang* v *Ottawa Electric Ry Co* [1926] A C 725 *South Indian Industrials Ltd Madras* v *Alemelu Ammal* [1923] M W N 314 315

[6] *Wheeler* v *New Merton Board Mills Ld* [1933] 2 K B 669 *Baddeley* v *Granville (Earl)* (1887) 19 Q B D 423

[7] *Ibid*

[8] *Haynes* v *Harwood* [1935] 1 K B 146 157 Dicta to the contrary in

ity in America has now been adopted by the Court of Appeal in England But where there is no need to take any risk the person suffering harm in doing so cannot recover [1]

Leading cases—ILOTT *v* WILKES BIRD *v* HOLBROOK HAYNES *v* HARWOOD

Injury by a golfer—The plaintiff was on a golf course as a spectator and the defendant who was not striking the ball in a game of golf but was merely demonstrating a stroke to the plaintiff s brother struck the plaintiff in the face with the golf club It was held that the defendant was negligent and that the plaintiff by going on to the course as a spectator did not take the risk of such an accident.[2]

Injury in rescuing—The plaintiff a police constable was on duty inside a police station in a street in which were a large number of people, including children. Seeing the defendants runaway horses with a van attached coming down the street he rushed out and eventually stopped them sustaining injuries in consequence in respect of which he claimed damages It was held that as the defendants must or ought to have contemplated that some one might *attempt to stop the horses in an endeavour to prevent injury to life and limb* and as the police were under a general duty to intervene to protect life and property the act of and injuries to the plaintiff were the natural and probable consequences of the defendants negligence and that the maxim *volenti non fit injuria* did not apply to prevent the plaintiff recovering [3] A horse belonging to the defendants and attached to one of their vans was seen by the plaintiff running past his house without the driver It entered a field adjoining the plaintiff s garden and the driver who had followed it was trying to pacify it but as it continued restive, the driver shouted for help The plaintiff went and attempted to hold the horse but it threw him to the ground causing him injuries in respect of which he sued the defendants. It was held that the plaintiff must have known that his attempt to hold the horse was attended with risk and that the principle of *volenti non fit injuria* applied and precluded the plaintiff from recovering [4] This case has been distinguished in the former case on the ground that there was no need to take any risk While the plaintiffs, husband and wife were in a shop as customers a skylight in the roof of the shop was broken owing to the negligence of contractors engaged in repairing the roof and a portion of the glass fell and struck the husband causing him a severe shock. His wife who was standing close to him was not touched by the falling glass but, reasonably believing her husband to be in danger she instinctively clutched his arm and tried to pull him from the spot In doing this she strained her leg in such a way as to bring about a recurrence of thrombosis. In an action to recover damages from the contractors it was held that the wife was also entitled to damages along with the husband in asmuch as what she did was in the circumstances a natural and proper thing to do [5]

Cutler v United Dairies (London) Limited [1933] 2 K. B 297 questioned.

[1] *Cutler v United Dairies (London) Limited* ibid

[2] *Cleghorn v Oldham* [1927] W N 147

[3] *Haynes v Harwood* [1935] 1 K. B 146

[4] *Cutler v United Dairies (London) Limited* [1933] 2 K. B 297

[5] *Brandon v Osborne Garrett & Co* [1924] 1 K. B 548

11 *Works of necessity*

This exception is based on the maxim *salus populi suprema lex* (the welfare of the people is the supreme law) a maxim founded on the implied assent on the part of every member of society that his own individual welfare shall in cases of necessity yield to that of the community and that his property liberty and life shall under certain circumstances be placed in jeopardy or even sacrificed for the public good There are many cases in which individuals sustain an injury for which the law gives no action as where private houses are pulled down, or bulwarks raised on private property for the preservation and defence of the kingdom against the King's enemies [1] or where houses are pulled down to stop a fire or goods cast overboard to save a ship or the lives of those on board It is only in cases of existing immediate and overwhelming public necessity that any such right exists [2] If the Crown takes the subject's land for the defence of the country, the Crown has to pay compensation for its use and occupation.[3]

The plaintiff let the shooting rights over his land to one C A fire broke out on the land and while the plaintiff's men were endeavouring to beat it out, the defendant who was the gamekeeper of C set fire to strips of heather between the fire and a part of the shooting where there were some nesting pheasants of his master The fire was extinguished by the plaintiff's men In an action of trespass against the defendant it was held that the defendant was not liable [4]

12 *Private defence*

Every person has a right to defend his own person property or possession against an unlawful harm. This may even be done for a wife or husband a parent or child a master or servant

The force employed must not be out of proportion to the apparent urgency of the occasion The person acting on the defensive is entitled to use as much force as he reasonably believes to be necessary The test is whether the party's act was such as he might reasonably in the circumstances think necessary for the prevention of harm which he was not bound to suffer The necessity must be proved [5] Injuries received by an innocent third person from an act done in self defence must be dealt with as accidental harm caused from a lawful act.

Every person is entitled to protect his property But he cannot for this purpose do an act which is injurious to his neighbour If for instance an extraordinary flood is seen to be coming upon land the owner of such land may fence off and protect his land from it and so turn it away with

[1] *Governor etc of Cast Plate Manufacturers v Meredith* (1792) 4 T R. 794 797

[2] *Maleverer v Spinke* (1538) Dyer Part I 36b

[3] *In re De Keyser's Royal Hotel Ltd* [1919] 2 Ch 197 [1920] A. C. 508

[4] *Cope v Sharpe* (No 2) [1912] 1 K. B 496

[5] *Janson v Brown* (1807) 1 Camp 41 *Wells v Head* (1831) 4 C. & P 568

out being responsible for the consequences although his neighbour may be injured by it Similarly an owner of agricultural land may protect his land from a visitation of locusts and turn away the pest without being responsible for the consequences to neighbouring owners[1] But a land owner on whose land there is a sudden accumulation of water brought there without any fault or act of his is not at liberty actively to let it off on to the land of his neighbour without making that neighbour any compensation for damages because the landowner by doing so has been able to save his own property from injury[2] The right of a person to protect his land from extraordinary flood extends to the doing of anything which is reasonably necessary to save his property but he cannot actively adopt such a course as may have the effect of diverting the mischief from his own land to the land of another person which would otherwise have been protected.[3]

Shooting a dog after it ceased to attack —Where the defendant was passing by the plaintiff s house, and the plaintiff s dog ran out, and bit the defendant s gaiter *and on the defendant turning round, and raising his gun the dog ran away* and he shot the dog as he was running away it was held that the defendant was not justified in so doing To justify shooting the dog he must be actually attacking the party at the time.[4]

Spearing a vicious stallion —A vicious stallion repeatedly attacked on a road a pair of mares belonging to the carriage in which the defendant was being driven and finally came into the defendant s compound in spite of attempts made to prevent him and continued his attacks until the defendant getting hold of a spear inflicted a somewhat severe wound on the left hind quarter of the animal After this the stallion made off but subsequently died from the effects of the spear wound. It was held that the defendant s action was justifiable and the owner of the stallion was not entitled to any damages[5]

13 *Plaintiff a wrong doer*

A plaintiff is not disabled from recovering by reason of being himself a wrong doer unless some unlawful act or conduct on his own part is connected with the harm suffered by him as part of the same transaction[6] A trespasser is liable to an action for the injury which he does but he does not forfeit his right of action for an injury sustained[7] Thus in *Bird* v *Holbrook*[8] the plaintiff was a trespasser as he climbed over defendants wall in pursuit of a fowl but he was held entitled to damages for

[1] *Greyvensteyn* v *Hattingh* [1911] A. C 355
[2] Per Lindley L J in *Whalley* v *Lanca & York Ry* (1884) 13 Q B D 131 140 141 *Ramanuja Chariar* v *Krishnasawmi Mudali* (1907) 3 M L T 368 distinguishing *Moholal* v *Bai Jivkore* (1904) 28 Bom. 472 6 Bom L R 529
[3] *Sami Ullah* v *Mukund Lal* (1921) 19 A L J 736
[4] *Morris* v *Nugent* (1836) 7 C & P 572
[5] *Turner* v *Jagmohan Singh* (1905) 27 All 531
[6] Pollock 13th Edition p 181
[7] *Barnes* v *Ward* (1850) 9 C B 392 420
[8] (1828) 4 Bing 628

the injury caused by a spring gun set by the defendant without notice in his garden although the injury would not have occurred if the plaintiff had not trespassed on the defendant s land

Leading case—BIRD *v* HOLBROOK

14 *Acts causing slight harm*

Nothing is a wrong of which a person of ordinary sense and temper would not complain Courts of Justice generally do not take trifling and immaterial matters into account except under peculiar circumstances such as the trial of a right or where personal character is involved This principle is based on the maxim *de minimis non curat lex* (the law does not take account of trifles) and is recognised in the Indian Penal Code (s 95) The maxim does not apply where there is an injury to a legal right

A walks across B s field without B s leave doing no damage A has wronged B because the act if repeated would tend to establish a claim to a right of way over B s land[1] A casts and draws a net in water where B has the exclusive right of fishing Whether any fish are caught or not A has wronged B because the act if repeated would tend to establish a claim or right to fish in that water

[1] Illustration to s 26 of the Indian Civil Wrongs Bill *Holford* v *Bailey* (1849) 18 L J Q B 109

CHAPTER VII

DISCHARGE OF TORTS

WHERE there is a vested right of action for a tort it may be discharged by—

1 The death of the parties
2 Waiver
3 Accord and satisfaction
4 Release
5 Acquiescence
6 Judgment recovered
7 Statutes of Limitation

1 *Death of one of the parties*

The common law maxim is *actio personalis moritur cum persona* (a personal right of action dies with the person) At common law if an injury were done either to the person or property of another for which damages only could be recovered in satisfaction the action died with the person to whom or by whom the wrong was done[1] As regards all actions essentially based on tort the principle was inflexibly applied[2] It is not known when this principle came into being for its genesis is hidden in the mists of antiquity From time to time it has been severely animadverted on by Judges for it is neither based upon justice nor common sense The ambit of its application was limited or curtailed by several statutes The Law Reform (Miscellaneous Provisions) Act 1934 has now abolished it altogether[3]

(1) *Death of the person wronged*

Personal wrongs—At common law executors or administrators of a person cannot maintain an action for personal wrongs committed during his lifetime e g assault libel false imprisonment, negligence not causing his death, seduction of his daughter etc The cause of action which the person wronged might have maintained for his mental or personal sufferings dies with him

At common law no one can recover damages for the death of another This is known as the rule in *Baker* v *Bolton*[4] In a civil court the death of a human being could not be complained of as an injury[5]—meaning an actionable injury A husband parent or master cannot recover damages in respect of instantaneous death of a wife[6] child[7] or

[1] *Wheatly* v *Lane* 1 William s Notes to Saunder s Rep 239

[2] *Raymond* v *Fitch* (1835) 2 Cr M & R 588 597 *Pulling* v *Great Eastern Ry Co* (1882) 9 Q B D 110 *United Collieries Ltd* v *Simpson* [1909] A C 383 391 *Chunilal* v *Secretary of State* (1910) 12 Bom. L R 769 776

[3] 24 & 25 Geo V c 41

[4] (1808) 1 Camp 493 *Admiralty Commissioners* v *SS Amerika* [1917] A C 38

[5] Per Lord Ellenborough in *Baker* v *Bolton* sup

[6] *Ibid*

[7] *Clark* v *London General Omnibus Co* [1906] 2 K. B 648

servant [1] If there is an interval between the wrongful act and the death damages may only be recovered for loss of society or services up to the time of death In *Bakers* case the plaintiff and his wife were passengers on the top of a stage coach belonging to the defendants Owing to the negligence of the defendants the stage coach was overturned and the plaintiff was much bruised and his wife was so severely hurt that she died a month after It was held that the plaintiff was entitled to damages for the bruises sustained by him and for the loss of the wifes society till the moment of her death But the rule in *Bakers* case does not apply where the cause of action is based upon the breach of a contract *In an action for breach of a warranty that tinned salmon sold by the* defendants to the plaintiff was fit for consumption as human food the plaintiff claimed damages on the ground that his wife having partaken of the salmon had in consequence died and that she having performed services for him in the care of his house and family until her death he was under the necessity after her death of hiring some one else to perform such services It was held that such damages were recoverable

Wrongs to property—(*a*) *Realty*—The common law did not provide any remedy after a persons death for an injury done in his lifetime to his real estate The heir at law devisee or remainderman could not sue in respect of it neither could the personal representative

(*b*) *Personalty*—Executors or administrators of a person could not, according to common law bring an action for a trespass done to his goods and chattels during his lifetime

Statutory exceptions—1 Under the Law Reform (Miscellaneous Provisions) Act 1934 on the death of any person all causes of action vested in him shall survive for the benefit of his estate except actions for defamation seduction inducing one spouse to leave or remain apart from the other and claim for damages for adultery [3] Where a cause of action survives (1) the damages recoverable shall not include exemplary damages (2) where the death of that person is caused the damages shall be calculated without reference to any loss or gain to his estate consequent on his death except that a sum in respect of funeral expenses may be included [4]

The rights conferred by this Act are in addition to the rights conferred by the Fatal Accidents Acts 1846 to 1908 or the Carriage by Air Act 1932 [5]

An injured person can claim damages for the shortening of his expectation of life by a wrongful act of the defendant [6] The claim is allowed not as an element tending to cause increased mental suffering but as a separate

[1] *Osborn* v *Gillet* (1873) L R 8 Ex 88

[2] *Jackson* v *Watson & Sons* [1909] 2 K B 193

[3] 24 & 25 Geo V c 41 s 1 (1)

[4] *Ibid* s 1 (2)

[5] *Ibid* s 1 (5)

[6] *Flint* v *Lovell* [1935] 1 K B 354 *Roach* v *Yates* [1938] 1 K B 256

head of damage Under the Law Reform (Miscellaneous Provisions) Act 1934 this right once vested in the injured person passes to his personal representatives on his death[1] Even if a person is killed instantaneously owing to the negligent act of the defendant the cause of action for the wrong comes down to his administrator

The plaintiff was father and administrator of the estate of his daughter who was seriously injured in a motor car collision by reason of the negligent driving of the defendant. Her right leg was amputated and she died four days after the accident. She was unconscious for nearly all the four days after the accident Her father as her administrator claimed to recover damages for the benefit of her estate in respect of (1) pain and suffering (2) the loss of the leg and (3) the shortening of reasonable expectation of her life under the provisions of the Law Reform (Miscellaneous Provision) Act It was held that the administrator stood in her shoes and her right to claim damages on all the three heads passed to him and that he was therefore entitled to recover damages for the benefit of her estate.[3] The deceased was killed instantaneously in a collision between a motor cycle and a motor car His administrator claimed damages for the loss of the expectation of life for the benefit of the estate It was contended that no damages for loss of expectation of life could be recovered when the death was instantaneous It was held that the cause of action was not the death but the collision that although there might have been only a split second or a very short interval of time between the collision and the death of the deceased the cause of action arose before the death and that damages were recoverable for the loss of expectation of life[4]

2 Under Lord Campbell s Act where a person s death is caused by the wrongful act neglect or default of another and the injured person if he had lived could have maintained an action and recovered damages in respect thereof the person causing injury is liable to an action for damages although the death is caused under such circumstances as amount in law to felony[5]

Such action is for the benefit of the wife husband parent and child of the person whose death is caused and is brought by and in the name of the executor or administrator of the deceased person (s 2) Parent includes grandfather grandmother step father step mother Child includes illegitimate child or adopted child[6]

The action must be brought within one year after death and only one action can be brought for the same cause of complaint (s 4)

Where there is no executor or administrator of the person whose death has been caused or where no action is brought by him within six months all or any of the persons for whose benefit the right of action is given may sue in their own names[7]

1 *Rose* v *Ford* [1937] A C 826 *Morgan* v *Scoulding* [1938] 1 All E R 28
3 *Rose* v *Ford* sup
4 *Morgan* v *Scoulding* sup
5 Fatal Accidents Act or what is known a Lord Campbell s Act 9 & 10 Vic. c 93 s. 1
6 Law Reform (Miscellaneous Provisions) Act 1934 s. 2 (1)
7 The Fatal Accidents Act 27 & 28 Vic c 95

The parties for whose benefit this right exists should show some appreciable pecuniary damage at the time or *in prospectu* to themselves owing to the death of the deceased[1] No action can be maintained for any pain or suffering arising from the loss of the deceased[2] or loss of society[3] or funeral and mourning expenses[4] or medical expenses incurred by the deceased[5] or if the deceased had accepted satisfaction for his injuries in his lifetime or if the loss arises not from the relationship but through some contract with the deceased The damages are given in reference to a pecuniary loss they are not given as a solatium that is to say for injured feelings[6]

3 Under the Employers Liability Act[7] the legal personal representatives of a workman who dies of injuries sustained during service have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer nor engaged in his work

4 By the Workmen s Compensation Acts 1925 to 1931 the dependents of a workman can claim compensation where the workman dies from injury which if he had survived would have given him a claim to compensation[8]

Indian law—The first legislation in India on this subject was made in 1855 In that year an Act was passed called the Legal Representatives Suits Act being Act XII of 1855 It was assumed by the Legislature that the maxim *actio personalis moritur cum persona* applied in India for the preamble to the Act says Whereas it is expedient to enable executors administrators or representatives in certain cases to sue and be sued in respect of certain wrongs which *according to the present law* do not survive to or against such executors administrators or representatives The Act then proceeds to provide for actions *by* the representative of a deceased person and actions *against* the representative of a deceased person

(1) Under Act XII of 1855 an action may be maintained by the executors administrators or representatives of a deceased person for any wrong committed in the lifetime of the deceased *which has occasioned pecuniary loss to the estate of such person* (and for no other wrong) committed within one year before his death

[1] *Taff Vale Ry* v *Jenkins* [1913] A. C. 1 *Barnett* v *Cohen* [1921] 2 K. B 461

[2] *Duckworth* v *Johnson* (1860) 4 H & N 653 659

[3] *Blake* v *Midland Ry Co* (1852) 18 Q B 93 followed in *Ratilal Kalidas* v *The Madras Ry Co* (1904) 4 M L. T 238

[4] *Dalton* v *S E Ry* (1858) 4 C. B N S. 296 A father cannot recover funeral expenses of his daughter killed by the negligence of an omnibus company *Clark* v *L G O Co* [1906] 2 K B 648

[5] *Pulling* v *Great Eastern Ry Co* (1882) 9 Q B D 110

[6] *Blake* v *Midland Ry Co* (1852) 18 Q B 93 *Franklin* v *S E Ry* (1858) 3 H & N 211

[7] 43 & 44 Vic c 42 s. 1

[8] 15 & 16 Geo V c 84 s 2 4 repealing the Workmen s Compensation Acts 1906 to 1923 16 & 17 Geo V c 42 20 & 21 Geo V c 29 21 & 22 Geo V c. 18

Then came the Indian Succession Act 1865 and the Probate and Administration Act 1881 Both these Acts contained a section which is now reproduced as s 306 of the Indian Succession Act 1925 The material portion of that section is as follows —

All demands whatsoever and all rights to prosecute or defend any action existing in *favour of or against* a person at the time of his decease survive *to and against* his executors or administrators except causes of action for defamation assault as defined in the Indian Penal Code or other personal injuries not causing the death of the party

The Calcutta High Court has held that the words personal injuries refer only to physical injuries A cause of action for malicious prosecution therefore, survives to the representatives of a deceased plaintiff[1] The Rangoon High Court has adopted the same meaning of the words personal injuries They mean corporal or bodily injuries injuries to person as opposed to injuries to property or reputation A cause of action in respect of injury to the credit and reputation of a person survives against the executors and administrators of the estate of the deceased defendant but not against his heirs as the latter term is not included in the former under s 306 of the Indian Succession Act[2] On the other hand the Madras High Court has in a full bench case, laid down that the expression personal injuries not causing the death of the party does not mean injuries to the body merely but all injuries which do not necessarily cause damage to the estate of the person wronged A suit for malicious prosecution therefore abates on the death of the defendant[3] The Patna[4] Bombay[5] and Allahabad[6] High Courts have adopted the view of the Madras High Court

The rule *actio personalis moritur cum persona* is not interfered with merely because the person injured incurred in his lifetime some expenditure of money in consequence of the personal injury[7]

Except in the cases specified above the right to sue for a tort does not cease with the life of either party Hence the application of the maxim *actio personalis moritur cum persona* is confined only to those cases

[1] *Krishna Behari Sen* v *Corporation of Calcutta* (1904) 31 Cal 993 *Bhupendra Narayan Sinha* v *Chandramoni Gupta* (1926) 53 Cal 990 *Pashu Patti Datta* v *Kelvin Jute Mills* [1937] 2 Cal 518

D K Cassim & Sons v *Sara Bibi* (1935) 13 Ran 385

[3] *Rustomji* v *W H Nurse* (1920) 44 Mad 357 F B *Murugappa Chettiar* v *Ponnusami Pillai* (1921) 44 Mad 828 *Palanappa Chettiar* v *Rajah of Ramnad* (1925) 49 Mad. 208 The last case further held that Act XII of 1855 does not enable the legal representatives to continue the suit to recover the costs as loss caused to the estate

[4] *Punjab Singh* v *Ramautar Singh* (1919) 4 P L J 676

[5] *Motilal Satyanarayan* v *Harnarayan* (1923) 25 Bom L R 435 47 Bom 716

[6] *Mahtab Singh* v *Hub Lal* (1926) 48 All 630

[7] *Josiam Tiruvengadachariar* v *Swami Iyengar* (1910) 34 Mad 76

(2) Under the Fatal Accidents Act (XVIII of 1855), if the death of a person is caused by wrongful act[1] neglect or default which would have entitled him to maintain an action and recover damages in respect thereof, the party causing injury is liable to an action or suit for damages The action can be maintained although the death is caused under such circum stances as amount in law to felony or other crime, e. g murder[2] Such action is to be for the benefit of the wife, husband parent[3] and child[4] if any of the person whose death has been so caused and must be brought by and in the name of the executor administrator or representative[5] of the deceased person The Court may give such damages[6] as it may think proportioned to the loss resulting from such death to the parties respec tively and the amount will be divided amongst them in such shares as the Court may direct[7] The Court must take into account the chances of life the chances of any improved conditions in which the family of the deceased might have passed their days the standard of living of the family which

[1] In order to establish civil lia bility against any person it must be proved either that he actually com mitted the wrongful act himself or at the least he actively aided or abetted the deed *Harna v Basant Kaur* (1912) P L R Sup No 8 of 1912 P W R No 128 of 1912

[2] *Mohammad v Maryam* (1931) 32 P L R 866

[3] The parents are not entitled to any compensation if they have not received in the past any pecuniary benefit from the son but expect to get such benefit in future *Secretary of State for India v Gopal Singh* (1913) P R No 112 of 1913

[4] An adopted son is not considered a child and therefore not entitled to claim damages *Vinayak v G I P Ry Co* (1870) 7 B H C (O C J) 113 *Shri Gopal v Mt Amba Devi* (1914) P R No 52 of 1914

[5] This word does not mean only executors or administrators but includes all or any one of the persons for whose benefit a suit may be brought under the Act and it makes no difference whether the deceased was a European or Eura sian *Johnson v The Madras Ry Co* (1905) 28 Mad 479 *Coolbai v Pes tonji* (1934) 37 Bom. L. R 410 *Esther Virginia Penheiro v Maurice Minney* (1934) 61 Cal 480

An adopted son is a legal represen tative and can maintain such a suit fo the benefit of persons entitled to com pensation *Vinayak v G I P Ry Co* sup

[6] As to the measure of damages see *Ratanbai v G I P Ry* (1871) 8 B H C (O C J) 130 *Sorabji v G I P Ry* (1870) 7 B H C (O C J) 119*n* *Lyell v Gunga Dai* (1875) 1 All 60 F B Even in cases where the estate of the deceased survives for the benefit of his family the relatives are entitled to compensation in re spect of their reasonable expectations of the value of the deceased s services which are lost to them *Mahi v Ambo* (1905) P R. No 56 of 1905 The compensation must be estimated at the financial loss sustained by the death *South Indian Industrials Ltd Madras v Alamelu Amma* [1923] M W N 344 *DeMello v Meredian Electrical Co* (1926) 29 Bom. L R. 102 *Secretary of State v Gokal Chand* (1925) 26 P L R 622 Nothing can be allowed as compensation for mental suffering *Ratilal Kalidas v The Madras Ry Co* (1901) 4 M L T 238 In assessing compensation for a young wife whose husband has been mur dered the Court should take into consideration the fact that she migh remarry *Mohammed v Maryam* (1931) 32 P L R 866

[7] *Vide* section 1 The right of the beneficiaries is not a joint right but a distinct and several right in respect of the same cause of action enforceable at the suit of all or one of them suing for himself and the rest *Johnson v The Madras Ry Co* (1905) 28 Mad. 479 The Court can appor tion the compensation as it thinks fit

was dependent upon the deceased [1] But it cannot take into consideration the mental suffering of the survivors [2]

A suit under this Act for damages for causing death is not barred by s 306 of the Indian Succession Act [3]

Only one suit can be brought for and in respect of the same subject matter of complaint provided that in any such suit the executor administrator or representative of the deceased may insert a claim for and recover any pecuniary loss to the estate of the deceased occasioned by such wrongful act neglect or default [4]

(2) *Death of the wrong doer*

At common law no action can be maintained against the executors or administrators of the wrong doer when the cause of action is founded upon tort such as assault and battery false imprisonment malicious prosecution [5] slander trespass for taking goods [6] fraud [7] negligence [8] Executors and administrators are deemed the representatives of the temporal property that is the debts and goods of the deceased but not of their wrongs They represent the debts and property and not the person of the testator or intestate But where property or the proceeds or value of property belonging to another have been appropriated by the deceased wrong doer and added to his own estate or moneys the property or the proceeds or value can be traced after his death to his estate which will be liable to the extent to which it has been augmented [9]

Under the Law Reform (Miscellaneous Provisions) Act 1934 on the death of any person all causes of action subsisting against him shall survive against his estate except actions for defamation seduction inducing one spouse to leave or remain apart from the other and claim for damages for adultery [10]

No proceedings are maintainable unless—

(*a*) proceedings were pending against the deceased at the date of his death or

Shri Gopal v *Mt Amba Devi* (1914) P R No 52 of 1914

[1] *Nani Bala Sen* v *Auckland Jute Co Ltd* (1925) 52 Cal 602 Costs as between attorneys and clients to be allowed *ibid* *Lakhmichand* v *Ratanbai* (1926) 29 Bom L R 78 The Court in assessing damages will take into consideration such factors as the possibility of the early death of the claimants and of the death of the deceased from other causes *Auppammal* v *M & S M Ry Co Ltd* (1937) 46 L W 452

[2] *Secretary of State for India* v *Mst Rukminibai* [1938] Nag 54

[3] *Balasubramaniam* v *Marian Rodrigues* (1934) 57 Mad 951

[4] Section 2 The use of the word occasioned as distinguished from caused in s. 1 is not intended to widen the tort feasor s liability *Secretary of State* v *Gokal Chand* (1925) 6 Lah. 451

[5] *Ma Shwe Thit* v *Maung Pe Aung* (1921) 4 U B R. 73

[6] *Tummala Nagabhushanam* v *Sri Rajah Venkatadri Appa Rou* (1912) 23 M L J 255 [1912] M W N 899

[7] *Peek* v *Gurney* (1873) L R 6 H L 377

[8] *Overend Gurney & Co* v *Gurney* (1869) L R. 4 Ch 701

[9] *Phillips* v *Homfray* (1883) 24 Ch. D 439 454

[10] 24 & 25 Geo V c. 41 s. 1(1)

(2) Under the Fatal Accidents Act (XVIII of 1855) if the death of a person is caused by wrongful act[1] neglect or default which would have entitled him to maintain an action and recover damages in respect thereof, the party causing injury is liable to an action or suit for damages The action can be maintained although the death is caused under such circumstances as amount in law to felony or other crime e g murder Such action is to be for the benefit of the wife husband parent[3] and child[4] if any of the person whose death has been so caused and must be brought by and in the name of the executor administrator or representative[5] of the deceased person The Court may give such damages[6] as it may think proportioned to the loss resulting from such death to the parties respectively and the amount will be divided amongst them in such shares as th Court may direct[7] The Court must take into account the chances of life the chances of any improved conditions in which the family of the deceased might have passed their days the standard of living of the family which

[1] In order to establish civil liability against any person it must be proved either that he actually committed the wrongful act himself or at the least he actively aided or abetted the deed *Hana v Basant Kaur* (1912) P L R Sup No 8 of 1912 P W R No 128 of 1912

[2] *Mohammad v Maryam* (1931) 32 P L R 866

The parents are not entitled to any compensation if they have not received in the past any pecuniary benefit from the son but expect to get such benefit in future *Secretary of State for India v Gopal Singh* (1913) P R No 112 of 1913

[4] An adopted son is not considered a child and therefore not entitled to claim damages *Vinayak v G I P Ry Co* (1870) 7 B H C (O C J) 113 *Shri Gopal v Mt Amba Devi* (1914) P R No 52 of 1914

This word does not mean only executors or administrators but includes all or any one of the persons for whose benefit a suit may be brought under the Act and it makes no difference whether the deceased was a European or Eurasian *Johnson v The Madras Ry Co* (1905) 28 Mad. 479 *Goolbai v Pestonji* (1934) 37 Bom L R 410 *Esther Virginia Penheiro v Maurice Minney* (1934) 61 Cal 490

An adopted son is a legal representative and can maintain such a suit for the benefit of persons entitled to compensation *Vinayak v G I P Ry Co* sup

[6] As to the measure of damages see *Ratanbai v G I P Ry* (1871) 8 B H C (O C J) 130 *Sorabji v G I P Ry* (1870) 7 B H C (O C J) 119n *Lyell v Gunga Dai* (1875) 1 All 60 F B Even in cases where the estate of the deceased survives for the benefit of his family the relative are entitled to compensation in respect of their reasonable expectation of the value of the deceased s service which are lost to them *Mahi v Ambo* (1905) P R No 56 of 1905 The compensation must be estimated at the financial loss sustained by the death *South Indian Industrials Ltd Madras v Alamelu Amma* (1923) M W N 341 *DeMello v Meredian Electrical Co* (1926) 29 Bom L. R. 402 *Secretary of State v Gokal Chand* (1925) 26 P L R 622 Nothing can be allowed as compensation for mental suffering *Ratilal Kalidas v The Madras Ry Co* (1904) 4 M L T 238 In assessing compensation for a young wife whose husband has been murdered the Court should take into consideration the fact that she migh remarry *Mohammed v Maryam* (1931) 32 P L R 866

[7] *Vide* section 1 The right of the beneficiaries is not a joint right but a distinct and several right in respect of the same cause of action enforceable at the suit of all or one of them suing for himself and the rest *Johnson v The Madras Ry Co* (1905) 28 Mad 479 The Court can apportion the compensation as it thinks fit

was dependent upon the deceased[1] But it cannot take into consideration the mental suffering of the survivors

A suit under this Act for damages for causing death is not barred by s 306 of the Indian Succession Act[3]

Only one suit can be brought for and in respect of the same subject matter of complaint provided that in any such suit the executor administrator or representative of the deceased may insert a claim for and recover any pecuniary loss to the estate of the deceased occasioned by such wrongful act neglect or default[4]

(2) *Death of the wrong doer*

At common law no action can be maintained against the executors or administrators of the wrong doer when the cause of action is founded upon tort such as assault and battery false imprisonment malicious prosecution[5] slander trespass for taking goods[6] fraud[7] negligence.[8] Executors and administrators are deemed the representatives of the temporal property that is the debts and goods of the deceased but not of their wrongs They represent the debts and property and not the person of the testator or intestate But where property or the proceeds or value of property belonging to another have been appropriated by the deceased wrong doer and added to his own estate or moneys the property or the proceeds or value can be traced after his death to his estate which will be liable to the extent to which it has been augmented[9]

Under the Law Reform (Miscellaneous Provisions) Act 1934 on the death of any person all causes of action subsisting against him shall survive against his estate except actions for defamation seduction inducing one spouse to leave or remain apart from the other and claim for damages for adultery[10]

No proceedings are maintainable unless—

(*a*) proceedings were pending against the deceased at the date of his death or

Shri Gopal v *Mt Amba Devi* (1914) P R. No 52 of 1914

[1] *Nani Bala Sen* v *Auckland Jute Co Ltd* (1925) 52 Cal. 602 Costs as between attorneys and clients to be allowed *ibid* *Lakhmichand* v *Ratanbai* (1926) 29 Bom L R 78 The Court in assessing damages will take into consideration such factors as the possibility of the early death of the claimants and of the death of the deceased from other causes *Kuppammal* v *M & S M Ry Co Ltd* (1937) 46 L W 452

Secretary of State for India v *Mst Rukminibai* [1938] Nag 54

[3] *Balasubramaniam* v *Marian Rodrigues* (1934) 57 Mad. 951

[4] Section 2 The use of the word occasioned as distinguished from caused in s. 1 is not intended to widen the tort feasor s liability *Secretary of State* v *Gokal Chand* (1925) 6 Lah 451

[5] *Ma Shwe Thit* v *Maung Pe Aung* (1921) 4 U B R. 73

[6] *Tummala Nagabhushanam* v *Sri Rajah Venkatadri Appa Row* (1912) 23 M L. J 2[illegible]5 [1912] M W N [illegible]

[7] *Peck* v *Gurney* (1873) L. R H L 377

[8] *Overend Gurney & Co* v *Gurr* (1869) L R 4 Ch 701

[9] *Phillips* v *Homfray* (18[illegible]) [illegible] Ch D 439 451

[10] 21 & 2[illegible] G[illegible] s. 1[illegible]

(*b*) the cause of action arose not earlier than six months before his death and proceedings are taken not later than six months after his personal representative took out representation[1]

Where damage has been suffered by reason of any act or omission in respect of which an action would have subsisted against any person if he had not died before or at the same time as the damage was suffered, there shall be deemed to have been subsisting against him before his death such action as would have subsisted if he had died after the damage was suffered

Indian law —Under Act XII of 1855 an action may be maintained against the executors or administrators or heirs or representatives of any deceased person for any wrong committed by him in his lifetime for which he would have been subject to an action provided such wrong is committed within one year before such person s death[3]

Under the English law the wrong should have been committed within six months prior to the wrong doer s death under the Indian law the period is one year

If a suit is brought against the wrong doer in his lifetime such suit abates on his death and cannot be continued against his heir and legal representative.[4] This Act does not apply to an action commenced against the wrong doer in his lifetime and only subsequently sought to be continued against his heir[5]

2 *Waiver by election*

Where a man has more than one remedy for a tort and he elects to pursue one of them giving up the others the other remedies are waived He cannot pursue them if he fails in the one elected Waiver is express or implied express when the person entitled to anything expressly and in terms gives it up in which case it nearly resembles release implied when

[1] 24 & 25 Geo V c 41 s 1 (3)

[2] *Ibid* s 1 (4)

[3] Section 1 Under Hindu law a son can be held liable for torts committed by his father during the latter s lifetime only to the extent to which the family estate has been benefited *Deoba* v *Babia* (1927) 23 N L R 131 This section was held inapplicable to a suit to recover property or its value after conversion *Adjai Coal Co* v *Jarra Lal* (1930) 32 Bom. L. R. 631

[4] *Haridas* v *Ramdas* (1889) 13 Bom. 677 *Sharifa* v *Munekhan* (1901) 3 Bom. L. R. 167 25 Bom. 574 *Ramchode Doss* v *Rukmany Bhay* (1905) 28 Mad 497 *Tummala Nagabhushanam* v *Sri Rajah Venkatadri Appa Row* (1912) 23 M. L. J 255 [1912] M W N 899

By the death of the defendant wrong doer after an appeal is filed the appeal does not abate *Gopal Ganesh* v *Ramchandra Sadashiv* (1902) 4 Bom. L. R 525 26 Bom. 597 followed in *Paramesi* v *Sundararaja* (1902) 26 Mad 499 *Nga Kyet Sein* v *Mi Kyin Mya* (1916) U B R. (1914 16) 105 *Ma Shwe Thit* v *Maung Lo Aung* (1921) 4 U B R 73

But if there are cross-objections filed by the plaintiff respondent the cross-objections will abate because if there is an appeal by the plaintiff it abates owing to the death of the defendant *Bhim Sain* v *Muhammad Ali* (1929) 11 Lah 1

[5] *Haridas* v *Ramdas* sup.

the person entitled to anything does or acquiesces in something else which is inconsistent with that to which he is so entitled

There are certain cases in which a person injured by a tort may at his election bring an action of tort or waive the tort and sue the wrong doer on a contract implied fictitiously by law Thus if the defendant obtains the plaintiff's money by fraud or other wrong the plaintiff may sue him in tort or for money had and received [1] Similarly if a man is wrongfully deprived of his goods which are afterwards sold he may bring an action for damages for the tort or he may sue for the price received by the defendant [2]

In cases such as the above the plaintiff must make his election between the two kinds of action. Once the election is made, e g to sue for money had and received and a judgment is obtained he cannot afterwards bring another action in tort though the judgment remains unsatisfied [3]

3 *Accord and satisfaction*

An accord is an agreement between two or more persons one of whom has a right of action against the other that the latter shall render and the former accept some valuable consideration in substitution for the right of action. Accord indicates the agreement and satisfaction the consideration which makes it operative When the agreement is executed and satisfaction has been made, the arrangement is called accord and satisfaction and operates as a bar to the right of action An accord and satisfaction in favour of one joint tort feasor operates in favour of them all when the injury is one and indivisible It can then give rise to but one cause of action and consequently if satisfaction is accepted as full and complete as against one person it operates with respect to the entire cause of action [4]

Where damages only are to be recovered accord and satisfaction is a good plea [5] e.g action for libel action under Lord Campbell's Act [6] actions for personal injuries [7] But where a person has agreed to accept a sum for personal injuries and subsequent damage not within the contemplation of parties when the agreement was made arises the original accord and satisfaction will not prevent him from bringing an action for further injury [8] Accord without satisfaction does not bar the right of action [9]

4 *Release*

A release is the giving or discharging of the right of action which a man has or may have against another man But a release executed under

[1] *Neate* v *Harding* (1851) 6 Ex 349

[2] *Rodgers* v *Maw* (1846) 15 M & W 444 448 *Thorappa* v *Umedmalji* (1923) 25 Bom. L R 604

[3] See *Rice* v *Reed* [1900] 1 Q B 54

[4] *Makhanlal* v *Panchamlal* (1934) 31 N L R. 27

[5] *Blake's* case (1606) 6 Rep 43*b*

[6] *Read* v *G E Ry* (1868) L R. 3 Q B 555

[7] *Ridcal* v *Great Western Ry* (1859) 1 F & F 706

[8] *Ellen* v *Great Northern Ry* (1901) 49 W R 395 *Roberts* v *Eastern Counties Ry* (1859) 1 F & F. 460

[9] *Lee* v *Lancashire & York Ry Co* (1871) L R 6 Ch 527

a mistake[1] or in ignorance of one's rights[2] or obtained by fraud[3] is not valid. A covenant not to sue at all is equivalent to a release and may be pleaded in bar[4]. A covenant not to sue one of two joint tort feasors does not operate as a release so as to discharge the other[5].

5. Acquiescence

Where a person who knows that he is entitled to enforce a right, neglects to do so for a length of time, the other party may fairly infer that he has waived or abandoned his right. But to deprive a man of his legal remedies there must be something more than a mere delay[6].

Direct acquiescence takes away the right of action[7].

6. *Judgment recovered*

The cause of action against a wrong doer in respect of a wrong is extinguished by a judgment obtained in a court of law. The judgment is a bar to the original cause of action because it is thereby reduced to a certainty and the object of the suit attained so far as it can be at that stage and it would be useless and vexatious to subject the defendant to another suit for the purpose of obtaining the same result. Hence the legal

[1] *Hore v. Becher* (1842) 12 Sim. 465.

[2] *Phelps v. Amcott* (1869) 21 L T 167; *Knapp v. Burnaby* (1608) 8 W. R. 305.

[3] *Hirschfield v. L. B. & S. C. Ry.* (1876) 2 Q. B. D. 1.

[4] *Ford v. Beech* (1848) 11 Q. B. 852, 871.

[5] *Duck v. Mayeu* [1892] 2 Q. B. 511; *Pollachi Town Bank Ltd. v. Subramania Iyer* [1931] M. W. N. 621.

[6] *Uda Begam v. Imam ud din* (1875) 1 All. 82, 86; *Kazi Mahamad v. Narotam Kuber* (1907) 9 Bom. L. R. 1117.

[7] In the following cases the right of action was held to have been taken away by acquiescence:—

The right to a house after it was dedicated as a house of prayer (*Sufroo Shaikh Durjee v. Futteh Shaikh Durjee* (1871) 15 W. R. 505); the recovery of possession by landlord of land let for cultivation with a tea nursery (*Langlois v. Rattray* (1878) 3 C. L. R. 1); or with a substantial brick house erected on it by a tenant (*Shib Doss Banerjee v. Bamun Doss Mookerjee* (1871) 15 W. R. 360; *Lalla Gopee Chand v. Shaikh Liakut Hossein* (1876) 25 W. R. 211; *Dattatraya Rayaji v. Shridhar Narayan* (1892) 17 Bom. 736; *Yeshwadabai v. Ramchandra Tukaram* (1893) 18 Bom. 66; *Dunia Lal Seal v. Gopi Nath Khetry* (1895) 22 Cal. 820; *Narayan v. Daji* (1899) 1 Bom. L. R. 191; *Krishna Kishore v. Mir Mohomed Ali* (1899) 3 C. W. N. 255; *Ismail Khan Mahomed v. Joygoon Bibee* (1900) 4 C. W. N. 210; *Ismail Khan Mahomed v. L. P. D. Broughton* (1901) 5 C. W. N. 816). The right of a landlord to prevent brick making by a tenant (*Nicholl v. Tarinee Churn Bose* (1875) 23 W. R. 298); or to prevent changing the character of land demised by planting grafts of mango trees (*Noyna Misser v. Rupikun* (1882) 9 Cal. 609); or to prevent erection of a house by the trespasser on the land trespassed (*Govind Puramanick v. Gooroo Churn Dutt* (1865) 3 W. R. 71; *Gujadhur Singh v. Nund Ram* (1866) 1 Agra 244); or to prevent erection of a *chabutra* so as to block up an old drain (*Nil Kant Sahoy v. Jujoo Sahoo* (1873) 20 W. R. 328); allowing of surface water being drained over one's land (*Heera Lall Kooer v. Purmessur Kooer* (1871) 15 W. R. 401); making of a road (*Radha Nath Banerjee v. Joy Kishen Mookerjee* (1864) 1 W. R. 288); closing of a road (*Banee Madhub Doss v. Ram Joy Rokh* (1868) 10 W. R. 316); or restoring a *bund* (*Bhyro Dutt v. Mussamut Lekhranee Kooer* (1871) 16 W. R. 123); or removing a privy (*Brommo Moyee Deb a Choudrain v. Koomodine Kant Banerjee Choudhry* (1872) 17 W. R. 466) were similarly held to be crystallised into right by acquiescence.

maxim *transit in rem judicatam*—the cause of action is changed into matter of record which is of a higher nature and the inferior remedy is merged in the higher[1] The person injured cannot bring a second action for the same wrong even though it is subsequently found that the damage is much greater than was anticipated when the action was brought If in an assault a person sustains a broken arm and a broken leg he must sue for both the injuries in the same action

Section 11 of the Code of Civil Procedure lays down the well known principle of *res judicata* which prevents a Court from hearing the same matter which has been adjudicated upon by a competent Court in a previous suit

Two distinct causes of action however may arise out of the same facts against the same wrong doer and in that event two separate actions may be brought The plaintiff a cab driver was held entitled to recover damages for personal injuries received in a collision by defendant s negligence though he had already recovered compensation in a previous action for injury to the cab

Continuing injuries—Where the injury is of a continuing nature the bringing of an action and the recovery of damages for the perpetration of the original wrong do not prevent the injured party from bringing a fresh action for the continuance of the injury In cases in which damage is not of the essence of the action as in trespass a fresh cause of action arises *de die in diem* and in cases in which damage is of the essence of the action as in nuisance a fresh cause of action arises as often as fresh damage accrues In cases of continuing nuisance successive actions may from time to time be brought in respect of their continuance

Subsidence caused by working of coal mines—Lessees of coal under M s land worked the coal so as to cause a subsidence of the land and injury to houses thereon in 1868 For the injury thus caused the lessees made compensation They worked no more but in 1882 a further subsidence took place causing further injury There would have been no further subsidence if an adjoining owner had not worked his coal or if the lessees had left enough support under M s land. It was held that the cause of action in respect of the further subsidence did not arise till that subsidence occurred and that M could maintain an action for the injury thereby caused although more than six years had passed since the last working by the lessees[4]

7 Statutes of limitation

There is a distinction between wrongs which are actionable *per se*

[1] *Buckland* v *Johnson* (1854) 15 C B 145 163 *King* v *Hoare* (1844) 13 M & W 494 504 See *Wright* v *The L G Omnibus Co* (1877) 46 L J Q B 429

[2] Act V of 1908

[3] *Brunsden* v *Humphrey* (1884) 14 Q B D 141

[4] *Darley Main Colliery Co* v *Mitchell* (1886) 11 App Cas 127 See *Holmes* v *Wilson* (1839) 10 A & E 503 The continuing use of the buttresses for the support of the road was, under the circumstances a fresh trespass.

and those which are actionable only where the plaintiff can prove that he has suffered actual damage. The period of limitation runs, in the first case, from the time when the wrongful act is committed in the second from the time of the plaintiff's first sustaining actual injury

In England there are various Statutes of Limitation fixing the time during which actions of tort must be brought

The periods within which suits can be brought in British Indian Courts against wrong-doers for obtaining redress are governed by the provisions of the Indian Limitation Act[1]

[1] The Indian Limitation Act (IX of 1908)
Three years—Obstruction to way obstruction to or diversion of water course trespass to immovable property infringement of copyright or other exclusive privilege waste
Two years—Loss of injury to or delay in delivery of goods by a carrier conversion actions under Act XII of 1855 against the representatives of a deceased malfeasance misfeasance or nonfeasance independent of contract
One year—False imprisonment actions under Acts XII and XIII of 1855 by the representatives of a deceased injury to person malicious prosecution libel and slander seduction procuring breach of contract actionable distress wrongful distraint.

CHAPTER VIII

LIABILITY FOR WRONGS COMMITTED BY OTHERS

A person may be liable in respect of wrongful acts or omissions of another in three ways —

(A) As having ratified or authorized the particular act

(B) As standing towards the other person in a relation entailing responsibility for wrongs done by that person and

(C) As having abetted the tortious acts committed by others

(A) RATIFICATION

An act done for another by a person not assuming to act for himself but for such other person though without any precedent authority whatever becomes the act of the principal if subsequently ratified by him In that case the principal is bound by the act whether it be for his detriment or advantage, and whether it be founded on a tort or a contract to the same extent as by and with all the consequences which follow from the same act done by his previous authority[1] *Omnis ratihabitio retrotrahitur et mandato priori æquiparatur* (every ratification of an act relates back and thereupon becomes equivalent to a previous request)

Three considerations arise before a person can be held liable for a tort by ratification

(1) It must be shown that the person ratifying the act ratified it with full knowledge of its being tortious or it must be shown that in ratifying and taking the benefit of the act he meant to take upon himself without inquiry the risk of any irregularity which might have been committed and to adopt the transaction right or wrong[2]

The act of ratification must take place at a time, and under circumstances when the ratifying party might himself have lawfully done the act which he ratifies[3]

(2) Only such acts bind a principal by subsequent ratification as were done at the time on the principal s behalf[4] What is done by a person on his own account cannot be effectually adopted by another If an act be done by a person it is in general immaterial whether the authority be given prior or subsequent to the act

[1] Per Tindal C J in *Wilson* v *Tumman* (1843) 6 M & G 236 242

[2] Per Loch J in *Rani Shama sundari Debi* v *Dukhu Mandal* (1869) 2 Beng L R (A C J) 227 229 *Girish Chandra Das* v *Gillanders Arbuthnot & Co* (1869) 2 Beng L R (O C J) 140 See *Venkatasa Naicker* v *T Srinivasa Chariyar* (1869) 4 M H C 410

[3] *Bird* v *Brown* (1850) 4 Ex 786 799 See *Buron* v *Denman* (1848) 2 Ex 167 *Whitehead* v *Taylor* (1839) 10 A & E 210

[4] *Brook* v *Hook* (1871) L R 6 Ex 89

(3) An act which is illegal and void is incapable of ratification[1] A ratification of a tort by a principal will not free the agent from his responsibility to third persons

(B) LIABILITY BY RELATION

Under this head comes the liability arising from relation such as that of—

I Master and Servant
II Owner and Independent Contractor
III Principal and Agent
IV Company and Directors.
V Firm and Partner
VI Guardian and Ward.

I *Master and Servant*

The relation between a master and servant gives rise to four kinds of liabilities —(1) Liability of master to third persons (2) liability of servant to third persons (3) liability of master to servant and (4) liability of servant to master

(1) LIABILITY OF MASTER TO THIRD PERSONS

The master is answerable for every such wrong of the servant as is committed in the course of the service though no express command or privity of the master be proved[2] The wrongful act need not be for the masters benefit[3] Although the particular act which gives the cause of action may not be authorized still if the act is done in the course of employment which is authorized the master is liable.[4] For torts committed in any matter beyond the scope of the employment the master is only liable if he has expressly authorized or subsequently ratified them

Though the doctrine of liability of the master for the acts of his servants is of modern growth yet it is based on the maxim *respondeat superior* (let the principal be liable) This maxim on grounds of policy and general convenience, puts the master in the same position as if he had done the wrong himself[5] The masters responsibility for his servants acts has also its origin in the maxim *qui facit per alium facit per se* (he who

[1] *Wilson* v *Tumman* (1843) 6 M & G 236 *Lewis* v *Read* (1845) 13 M & W 834

[2] *Laugher* v *Pointer* (1826) 5 B & C 547 554 *Barwick* v *English Joint Stock Bank* (1867) L R 2 Ex 259 265

[3] *Lloyd* v *Grace Smith & Co* [1912] A C 716 The words for the masters benefit in the statement of law enunciated by Willes J are held to apply to the facts of the particular case and not meant as a general proposition *ibid*

[4] *Citizens Life Ass Co* v *Brown* [1904] A C 423 428 *Mackay* v *Commercial Bank of New Brunswick* (1874) L R 5 P C 394 *Swire* v *Francis* (1877) 3 App Cas 106 *Houldsworth* v *City of Glasgow Bank* (1880) 5 App Cas 317 326 *Burma Trading Corp Ltd* v *M M Sherazee* (1878) 5 I A. 130 See *Mati Lal Raha* v *Indra Nath Bannerjee* (1909) 36 Cal 907 in which a master was held liable for a libel written and published by his servant.

[5] *Queen* v *Holbrook* (1878) 4 Q B D 42 51

does an act through another is deemed in law to do it himself) The true principle is —A person who puts another in his place to do a class of acts in his absence, necessarily leaves him to determine, according to the circumstances that arise, when an act of that class is to be done and trusts him for the manner in which it is done consequently he is answerable for the wrong of the person so intrusted either in the manner of doing such an act, or in doing such an act under circumstances in which it ought not to have been done provided that what is done is not done from any caprice of the servant but in the course of the employment [1]

Servant and master —A servant is a person who voluntarily agrees whether for wages or not to subject himself at all times during the period of service to the lawful orders and directions of another in respect of certain work to be done A master is the person who is legally entitled to give such orders and to have them obeyed [2] The relation of master and servant exists only between persons of whom the one has the order and control of the work done by the other [3]

A master is under no liability for the acts of the servant whom he has temporarily lent to another person the acts of the servant being for the time being beyond his control If one person lends his servant to another for a particular employment the servant for anything done in that particular employment must be dealt with as the servant of the man to whom he is lent, although he remains the general servant of the person who lent him [4] In a sense that is to say a general sense he is the servant of the master who sends him but upon the practical point of responsibility when he is doing the work of and under the orders or control of the other employer to whom he is sent he is in the eye of the law the servant of the latter and the latter is in the eye of the law his employer [5] Thus a person may be the servant of another on a single occasion and for

[1] *Bayley* v *Manchester Sheffield & Lincolnshire Ry Co* (1872) L R 7 C P 415 420 on appeal (1873) L R 8 C P 148

[2] Eversley 907 908 *Yewens* v *Noakes* (1880) 6 Q B D 530 532

[3] See *Hillyer* v *Governors of St Bartholomew s Hospital* [1909] 2 K B 820 *Union Steamship Co* v *Claridge* [1894] A C 185 *Goolbai* v *Pestonji* (1934) 37 Bom L R 410 A cattle owner is responsible for the acts of his cattle while in charge of his servant He is not responsible for the acts of cattle while in charge of a bailee *Ma Myaing* v *Maung Shwe The* (1916) 9 I B R 54 The relationship between a *pardanashin* lady and her employees for building houses is that of a master and servant *Nagendra Nath Singha* v *Srimati Nagendra Bala Choudhurani* (1926) 43 C L J 479 The mere proclamation of a strike does not terminate the relationship of master and servant and make the servant lose his character as a servant After the servant has struck work it should be considered whether he can be regarded as acting in the course or within the scope of his employment *East Indian Railway Company* v *Sheubux Ray Ghanshyam Das* (1928) 48 C L J 37

[4] Per Cockburn C J in *Rourke* v *White Moss Colliery Co* (1877) 2 C P D 205 209 *Murray* v *Currie* (1870) L R 6 C P 24 *Abdul Latiff* v *Pauling & Co* (1916) 19 Bom L R 167 *Kondiba Gopal* v *Mestrejean* (1927) 30 Bom L R 162

[5] *A H Bull & Co* v *W African Shipping etc Co* [1927] A C 686 691

an individual transaction provided the other can control him If A borrows of B a horse and chaise and goes in it accompanied by C on an excursion of pleasure, C driving and by C s mismanagement the horse and chaise are driven against and injure the horse of another person the latter can maintain an action for the injury against A[1] Where the owner of a vehicle, being himself in possession and occupation of it requests or allows another person to drive this will not of itself exclude his right and duty of control and therefore, in the absence of further proof that he has abandoned that right by contract or otherwise the owner is liable as principal for damage caused by the negligence of the person actually driving[2]

There is no difference between the cases of a master lending a general servant for a consideration and lending him gratuitously[3] It is not necessary to constitute the relationship of master and servant that there should be any consideration for the service

Carriage cases —Where the owner of a carriage hired of a stable-keeper a pair of horses to draw it for a day and the owner of the horses provided a driver through whose negligent driving an injury was done to a horse belonging to a third person it was held that the owner of the carriage was not liable to be sued for such injury[4] Where the owner of a carriage horses and harness, was supplied with a driver by a livery stable keeper and provided his own livery for the driver who had driven for him continuously for six weeks, it was held that the driver was the servant of the owner of the carriage and not of the livery stable keeper and the owner therefore was liable for the accident caused by him[5] A hack driver employed on the usual terms of paying so much a day for his hack and keeping the rest for himself is, as between the cab-proprietor and the public the servant of the proprietor who is therefore liable for the cab driver s negligence while acting within the scope of the purposes for which the cab is intrusted to him[6] The Bombay High Court has held likewise[7]

Injury caused by a driver friend of a motor car —The defendant was in his motor car with him, on his invitation being two friends E and P E drove the car and owing to his negligence, it collided with another vehicle and P sustained injuries from which he died P s widow sued the defendant under Lord Campbell s Act for damages. It was held that as the defendant was in the car and there was no evidence that he had abandoned his right of control he was liable notwithstanding that by a casual delegation he had entrusted its actual physical management and mechanical control to E[8]

[1] *Wheatly* v *Patrick* (1837) 2 M & W 650

[2] *Samson* v *Aitchison* [1912] A C 844

[3] *Donovan* v *Laing Wharton and Down Construction Syndicate* [1893] 1 Q B 629 633 *Bain* v *Central Vermont Railway Co* [1921] 2 A C 412

[4] *Laugher* v *Pointer* (1826) 5 B & C 547 *Waldock* v *Winfield* [1901] 2 K B 596

[5] *Jones* v *Scullard* [1898] 2 Q B 565

[6] *Powles* v *Hider* (1856) 6 El & Bl 207

[7] See *Bombay Tramway Co Ltd* v *Khairaj* (1883) 7 Bom 119

[8] *Pratt* v *Patrick* [1924] 1 K B 488

Injury caused by an engine-driver —The plaintiff's husband was killed owing to the negligence of the defendant company's engine driver in disregarding the signals of another company upon whose line he was driving the engine under an agreement between the companies for joint working each company paid the drivers employed in the joint service for the service on its own line The plaintiff sued the respondents for damages. It was held that the defendant company was not liable since at the moment of the accident the engine driver was under the control of the other company [1]

Course of service —The expressions acting within the course of employment, or service or business and acting within his authority and acting within the scope of his agency as applied to a servant or agent speaking broadly mean one and the same thing To the circumstances of a particular case one may be more appropriate than the other Such expressions extend the master's liability beyond the actual authority given to the servant [2] The injury done by a servant in the course of his service or employment for which the master becomes liable is classified by Sir Frederick Pollock (and his classification is followed in the case of *Iswar Chunder Santra* v *Satish Chunder Giri*[3]) in the following manner —

(1) The wrong may be the natural consequence of something being done by a servant with ordinary care in execution of the master's specific orders

Here the servant is the master's agent in a proper sense and the master is liable for that which he has truly commanded to be done He is also liable for the natural consequences of his orders even though he wished to avoid them and desired his servant to avoid them [4]

Laying rubbish under master's order —Where a master ordered a servant to lay down a quantity of rubbish near his neighbour's wall but so that it might not touch the same, and the servant used ordinary care in executing the orders of his master but some of the rubbish naturally ran against the wall and damaged it, it was held that the master was liable [5]

Servant procuring illegal warrant of distraint —Where the Secretary of a Municipal Board procured the issue of a warrant of distraint for a sum exceeding what was due from the person against whom the warrant was obtained and proceeded to seize and sell the goods of such person it was held that the Municipal Board was liable for the acts of its Secretary [6]

(2) The wrong may be due to the servant's want of care in carrying on the work or business in which he is employed Negligence in itself will not exempt the master from liability [7] Masters have been held

[1] *Bain* v *Central Vermont Railway Co* [1921] 2 A C 412

[2] *Dyer* v *Munday* [1895] 1 Q B 742

[3] (1902) 30 Cal 207 211

[4] *Gregory* v *Piper* (1829) 9 B & C 591 See *J Rand Ltd* v *Craig* [1919] 1 Ch 1

[5] *Gregory* v *Piper* ibid

[6] *Municipal Board of Mussoorie* v *Goodall* (1904) 26 All 482

[7] *Lancashire and Yorkshire Railway* v *Highly* [1917] A. C. 352 *Shaik Jaffer Hiptullah Bhoy Ginning and Press Factory* v *Shaik Ismail* [1937] Nag 88

liable for negligent driving[1] or for negligently lighting fire by their servants

Here it must be established that the servant is a wrong doer, and liable to the plaintiff before any question of the master's liability can be entertained If the servant instead of doing that which he is employed to do does something which he is not employed to do at all the master cannot be said to do it by his servant and therefore is not responsible for the negligence of his servant in doing it[3]

Whether the servant is really bent on his master s affairs or not is a question of fact Not every deviation of the servant from the strict execution of duty nor every disregard of particular instructions will be such an interruption of the course of employment as to determine or suspend the master's responsibility But where there is not merely deviation but a total departure from the course of the master s business so that the servant may be said to be on a frolic of his own [4] the master is no longer answerable for the servant s conduct Where the journey is not on the master s business and the master is not in control he is not liable for his servant s act [5]

Master liable —Carriage and horse —The defendant was engaged in constructing a sewer and employed men with horses and carts. The men so employed were allowed an hour for dinner but were not permitted to go home to dine or to leave their horses and carts. One of the men went home about a quarter of a mile out of the direct line of his work to his dinner and left his horse unattended in the street before his door The horse ran away and damaged *certain railings belonging to the plaintiff It was held that the defendant* was liable as the driver was acting within the scope of his employment [6] The defendant employed a man to drive a cart with instructions not to leave it and a lad who had nothing to do with the driving to go in the cart and deliver parcels to the customers of the defendant The driver left the cart in which the lad was, and went into a house While the driver was absent the lad drove on and came into collision with the plaintiff s carriage It was held that the negligence of the driver in so leaving the cart was the effective cause of the damage and that the defendant was liable [7]

Injury by a taxi driver —The defendants were the proprietors of taxi-cabs which they let out on hire By an agreement with one of their customers one of the cabs was appropriated to his exclusive use A driver in their employment by the order of their general manager whose orders it was the duty of the driver to obey drove him in the cab upon his private business. The general manager

[1] *Jones* v *Hart* (1698) 2 Salk 440

[2] *Tuberril* v *Stamp* (1697) 12 Mod 152 1 Salk 13 *Fillster* v *Phippard* (1847) 11 Q B 347 *Black* v *Christchurch Finance Co* [1894] A C 48

[3] *Mitchell* v *Crassweller* (1853) 13 C B 237 247 *J Rand Ltd* v *Craig* [1919] 1 Ch 1

[4] Per Parke B in *Joel* v *Morison* (1834) 6 C & P 501 503

[5] *Britt* v *Galmoye* (1928) 44 T L R 294

[6] *Whatman* v *Pearson* (1868) L R 3 C P 422

[7] *Engelhart* v *Farrant & Co* [1897] 1 Q B 240

had no authority to use the cab for that purpose but the driver had no reason to suppose that this order was an improper one The plaintiff was injured by the negligence of the driver while driving the cab It was held that the driver was acting within the scope of his employment while so driving the cab and that the defendants were liable for his negligence [1]

Injury in unloading a ship — A stevedore employed to ship iron rails had a foreman whose duty it was to carry the rails from the quay to the ship after the carman had brought them to the quay and unloaded them there The carman not unloading the rails to the foreman s satisfaction the latter got into the cart and threw out some of them so negligently that one fell upon and injured the plaintiff It was held that the foreman was acting within the scope of his employment so as to render the stevedore liable for his acts [2]

Injury by a railway employee — M a cloak room clerk in the defendants employ used to take up parcels for passengers from the cloak room to the train as part of his duty A passenger had asked him to take a parcel to the train which he did and as he was running back he ran against another porter who in his turn came against the ticket-collector and the ticket collector upset the plaintiff's wife causing injuries which resulted in her death It was held that defendants were liable since at the time of the accident the cloak room clerk was acting within the scope of his employment [3]

Want of care regarding petrol — The owner of a motor garage leased it to a firm of motor engineers who agreed with the defendants to give them the use of it as a garage for motor lorries A youth employed by the defendants while drawing motor spirit from a drum into a tin struck a match lit a cigarette and then threw the match on the floor This set light to some oil and petrol lying above the floor the fire spread to the motor spirit flowing from the drum and the garage was consumed The owner sued the defendants for the negligence of their servant It was held that a servant being engaged in an act which was within the scope of his employment and required special caution and having failed to exercise caution was guilty of negligence in the course of his employment and that the defendants were liable [4]

Injury to pupil owing to school master s negligence — In the course of gymnastic training a school boy was required to vault over a horse For some reason the boy landed in a stumble and was injured The master in charge did nothing to assist the boy in landing It was held that the master had not taken reasonable care and the Education Authority were liable in damages to the injured boy [5]

Master not liable — Burning of a shed by a carpenter — The plaintiff lent his shed to the defendant to make therein a signboard and D a carpenter

[1] *Irwin v Waterloo Taxi Cab Co Ltd* [1912] 3 K B 588

Burns v Poulsom (1873) L R 8 C P 563 A boat which S let to G for unloading a ship was lost in consequence of the negligence of the mate S sued the captain for the damage sustained It was held that the captain was not absolved from liability because the injury was caused by the negligence of the crew although they acted contrary to his orders *Sutherland v Shaw* (1865) Bourke (A. O C J) 92

[3] *Milner v Great Northern Railway Co* (1884) 50 L T N S 367

[4] *Jefferson v Derbyshire Farmers Ltd* [1921] 2 K B 281

[5] *Gibbs v Barking Corporation* [1936] 1 All E R 115 *Simmons v Mayor of Huntingdon* [1936] 1 All E R 596

employed by the defendant whilst at work in the shed making the signboard lighted his pipe from a match with a shaving which he dropped and thereby set fire to the shavings on the ground by which the shed was burnt It was held that the defendant was not liable because D was only licensed to use the shed for the purposes of making the signboard and when he used it for other purposes and those purposes exclusively his own his license was at an end and he became an independent wrong doer [1]

Carriage cases—In cases where the enterprise is entirely the servant s—if for instance he takes his master s carriage without leave for purposes entirely his own—the master is not responsible. The defendant a wine merchant sent his carman and clerk with a horse and car to deliver some wine and to bring back some empty bottles on their return when about a quarter of a mile from the defendant s offices the carman instead of performing his duty and driving to the defendant s offices, depositing the bottles, and taking horse and cart to stables in the neighbourhood was induced by the clerk (it being after business hours) to drive in quite another direction on business of the clerk s and while they were thus driving the plaintiff was run over owing to the negligence of the carman It was held that the defendant was not liable for the carman was not doing the act in doing which he had been guilty of negligence in the course of his employment as servant [2] Where the plaintiff had been injured by the negligent driving of the conductor of an omnibus who at the end of a journey and in the absence of the regular driver took charge of the omnibus and drove it round through some neighbouring by treets apparently with the intention of turning it round to be ready for the next journey the defendants (masters) were held not liable as the conductor was not a person authorized to drive.[3] The defendant sent his carriage to be repaired by the plaintiff who was a coach builder The plaintiff lent a carriage of his own to the defendant for use while the repairs were going on The coachman of the defendant without his know ledge took the plaintiff s carriage out for his own purposes, and while he was driving the carriage it was injured through his negligence. In an action to recover the cost of repairing it it was held that as the coachman at the time when the injury was done to the carriage was not acting in the course of his employment the defendant was not liable.[4] The plaintiff at the request of a servant of the defendant got into the defendant s cart, which was then in the charge of the servant in order to render assistance to another servant of the defendant who had been rendered unconscious by an accident The plaintiff fell out of the cart and was injured through the negligence of the servant in charge of the cart in causing the horse to start. In an action against the defend ant for damages for the injuries sustained by the plaintiff it was held that the existence of an emergency gave no implied authority to the servant to invite the plaintiff into the cart and that the defendant was not liable to the plaintiff [5]

[1] *Williams* v *Jones* (1865) 3 H & C 602 *J Rand Ltd* v *Craig* [1919] 1 Ch 1

[2] *Storey* v *Ashton* (1869) L R 4 Q B 476 *Mitchell* v *Crasweller* (1853) 13 C B 237 *Rayner* v *Mitchell* (1877) 2 C P D 357

[3] *Beard* v *London General Omnibus Co* [1900] 2 Q B 530 *Ricketts* v *Thos Tilling Ltd* [1915] 1 K B 644

[4] *Sanderson* v *Collins* [1904] 1 K B 628

[5] *Houghton* v *Pilkington* [1912] 3 K B 308

Indian cases.—Injury caused by the cleaner of a motor car.—Where a chauffeur who was taking his master's car to a workshop for repairs finding the lane leading to it impassable left the car in charge of the cleaner whose duty was only to clean the car and who was forbidden to drive it and went to the workshop and during his absence the cleaner drove it against and broke a municipal lamp-post, it was held that the master was not liable for the act of the cleaner which lay outside the scope of the latter's employment and further that he was also not liable for the act of the chauffeur as in leaving the car with the cleaner he was not guilty of negligence under the circumstances.[1]

Deviation by a driver of a motor car.—Whether the driver of a motor car deviated from the instructions of his master and drove the car to his home to take meal and subsequently while going to the garage where he was ordered to go ran into the plaintiff's car it was held that the master was liable for at the time of the collision he was acting in the course of his employment.[2] The defendant gave instructions to his driver to take his car to a friend and bring it back after the friend had finished with the same. The friend used the car and asked the driver to bring it back next morning. The driver took the car that night on an errand of his own instead of taking it back to the defendant's bungalow. The next morning while going to the friend's bungalow he negligently caused the death of a person. In a suit by the widow and the son of the deceased to recover compensation under the Fatal Accidents Act it was held that the defendant was liable since at the time of the accident the driver was in the course of employment of the defendant and the circumstance that the driver deviated the previous night from his instructions would not relieve the defendant of his liability.[3]

Damage caused by leaving a tap open.—The plaintiffs occupied premises beneath the offices of the defendants who were solicitors. One of the defendants had a room in the offices and in it was lavatory for his own use exclusively and his orders to his clerks were that no clerk should come into his room after he had left. A clerk went into the room to wash his hands at the lavatory after his employer had left turned the water tap and negligently left it so that water flowed from it into the plaintiff's premises, and damaged them. It was held that the act of the clerk was not within the scope of his authority or incident to the ordinary duties of his employment and that the defendants were not liable.[4] But where a clerk upon leaving off his day's work turned on the tap in a lavatory provided for the use of himself and other clerks in the defendant's service and finding no water he went away without turning the tap off so that in the night when the water was turned on it overflowed went through the floor and damaged the plaintiff's goods in the room below the employer of the clerk was held responsible for the clerk's negligence on the ground that whether the use of the lavatory by the clerk was or was not within the scope of his authority it was at all events an incident to his employment so as to render his employer liable for the damage resulting from his negligence in such use.[5]

[1] *Nalini Ranjan Sen Gupta v. Corporation of Calcutta* (1925) 52 Cal 983.

[2] *Roberts v. Shanks* (1924) 27 Bom L R 548.

[3] *Stanes Motors Ltd v. Peter* (1935) 59 Mad. 402.

[4] *Stevens v. Woodward* (1881) 6 Q B D 318.

[5] *Ruddiman & Co v. Smith* (1889) 60 L. T 708.

(3) The servant's wrong may consist in excess or mistaken execution of a lawful authority.

To make the master liable it must be shown here that—

(*a*) the servant intended to do on behalf of his master something of a kind which he was in fact authorized to do; and

(*b*) the act, if done in a proper manner, or under the circumstances erroneously supposed by the servant to exist, would have been lawful. The master is chargeable only for acts of an authorized class which in the particular instance are wrongful by reason of excess or mistake on the servant's part. For acts which he has neither authorized in kind nor sanctioned in particular he is not chargeable. Interference with passengers by guards and arrest of supposed offenders by servants fall under this head.

A servant has implied authority to make reasonable efforts to protect and preserve his master's property in cases of emergency endangering it. For acts done by the servant within the scope of that authority the master is responsible. The servant's acts may exceed the authority. Whether they do or not is a question of degree.[1]

Acts of railway employees.—Where the plaintiff, a passenger on the defendants' line of railway, sustained injuries in consequence of being violently pulled out of a railway carriage by one of the defendants' porters, who acted under the erroneous impression that the plaintiff was in the wrong carriage;[2] and where the servant was authorized by the railway company to arrest persons supposed to be guilty of committing offences for which the company had power to arrest and the servant made a mistake and arrested a person whom he supposed to be but who in fact was not guilty of such an offence,[3] it was held that the railway companies were liable.

Forcible dragging out of a passenger from a bus.—Where a guard of the defendant's omnibus, in removing therefrom a passenger whom he deemed to be drunk, forcibly dragged him out and threw him upon the ground whereby he was seriously injured, it was held that the master was liable for the injury caused by the wanton and violent conduct of his servant in the performance of an act within the course of his employment.[4]

Pupil injured in carrying out teacher's orders.—The plaintiff, a girl aged about fourteen, attended a school of the defendant corporation. A teacher directed the plaintiff during school hours to poke the fire and to do a stove in the teacher's common room where the teacher proposed to have her lunch. While the plaintiff was carrying out the order her pinafore caught fire and she was seriously burnt. It was held that the act of the teacher was within the scope of her employment.

1 *Poland* v. *John Parr & Sons* [1927] 1 K.B. 236; *Rees* v. *Thomas* [1899] 1 Q.B. 1015; *Percy* v. *Glasgow Corporation* [1922] 2 A.C. 299.

2 *Bayley* v. *M. S. & L. Ry.* (1872) L.R. 7 C.P. 415; *Lowe* v. *G. N. Ry.* (1893) 62 L.J.Q.B. 524.

3 *Moore* v. *Metropolitan Ry.* (1872) L.R. 8 Q.B. 36; *Goff* v. *G. N. Ry.* (1861) 3 El. & El. 672; *Percy* v. *Glasgow Corporation* supra.

4 *Seymour* v. *Greenwood* (1861) 7 H. & N. 355; *Smith* v. *North Metropolitan Tram Co.* (1891) 55 J.P. 630.

which was not strictly confined to teaching alone and that therefore the defendant corporation was liable to the plaintiff for the consequences of the teacher's negligent act [1]

Giving a blow to a boy suspected of stealing.—A carter in the employment of the defendants was following close behind a waggon laden with sugar in bags and being driven by one of his employees. He saw a boy walking beside the waggon with his hand upon one of the bags. Thinking that the boy was stealing sugar from the bag he gave him a blow with his hand on the back of the neck. The boy fell and the wheel of the waggon injured his foot. It was held that the carter had implied authority to make reasonable efforts to protect the defendants' property, that the violence exerted was not so excessive as to take his act outside the scope of the authority, and that the defendants were liable.

For acts wholly outside authority a master is not liable. He is not answerable if the servant takes on himself, though in good faith and meaning to further the master's interest, that which the master has no right to do even if the facts were as the servant thinks them to be.

Leading case—POULTON v. LONDON & S. W. RY.

Wrongful arrest by railway employees.—In the leading case a station master having demanded payment for the carriage of a horse conveyed by the defendant company arrested and detained the plaintiff for non payment thereof until it was ascertained by telegraph that all was right. The railway company had no power to arrest for non payment of carriage. It was held that the railway company were not liable as the station master in arresting the plaintiff did an act which was wholly illegal not merely in the mode of doing it but in the doing of it at all [3]. A foreman porter in the service of a railway company who in the absence of the station master was temporarily in charge of a station gave in charge a person whom he suspected to be stealing the company's property. It was held that as he had no implied authority to do so the company was not liable [4].

Wrongful arrest by tram conductors.—Where a tramway company gave to their conductors printed instructions not to give passengers into custody without the authority of an inspector or timekeeper except in cases of assault and the conductor of a car in which the plaintiff was a passenger detained the plaintiff on a charge of passing bad money it was held in an action for false imprisonment against the company that they were not liable [5] but where no such instructions were given the company were held liable [6].

Wrongful arrest by a barman.—The plaintiff had offered the defendant's bar manager a foreign gold coin and on its being refused gave a half sovereign in its place for which he received change and left the house. The bar manager

[1] *Smith v. Martin and the Corporation of Kingston on Hull* [1911] 2 K. B. 775.
[2] *Poland v. John Parr & Sons* [1927] 1 K. B. 236.
[3] *Poulton v. L. & S. W. Ry.* (1867) L. R. 2 Q. B. 534.
[4] *Edwards v. L. & N. W. Rly.* (1870) L. R. 5 C. P. 445.
[5] *Furlong v. S. L. Tram Co.* (1884) 48 J. P. 829.
[6] *Allen v. L. & S. W. Ry.* (1870) L. R. 6 Q. B. 65; *Bank of New South Wales v. Ouston* (1879) 4 App. Cas. 270.

followed the plaintiff and gave him into custody of a policeman for attempting to pass bad money it was held that the defendant was not liable for the manager had no implied authority to arrest the plaintiff as the defendant s property was no longer in danger and the arrest was made only for the purpose of vindicating the law[1]

Damage caused by a servant—A servant of the defendant who was staying in the plaintiff s hotel broke a filter the property of the plaintiff In a suit by the plaintiff for damages it appeared that the servant when he broke the filter was not acting within the scope of his employment nor on the defendant s business It was held that the defendant was not liable for the act of his servant and that the plaintiff was not entitled to any damages.[2]

(4) A wilful wrong such as assault provided the act is done on the master s behalf and with the intention of serving his purposes

A master is responsible for the improper act of his servant even if it be wilful reckless or improper provided the act is the act of the servant in the scope of his employment and in executing the matter for which he was engaged at the time.[3] An employer is responsible for damages caused by the negligent act of his servant in carrying out the work which he is employed to do even if the act incidentally involves a trespass which the employer has not authorized[4] But he will not be liable for wilful acts of his servant done contrary to his orders.[5] Thus a servant who commits an unnecessary assault in levying a distress is not acting within the scope of his authority and does not make his employers responsible[6] The Government is not responsible for the embezzlement of stolen property by a police officer[7] A master is not liable for malicious prosecution by his servant unless the prosecution was within the scope of the servant s authority[8] or authorized by the master[9]

Leading case—LIMPUS *v* LONDON GENERAL OMNIBUS CO

Pulling up an omnibus across a road—In the leading case the driver of an omnibus wilfully and contrary to express orders from his master pulled it across the road in order to obstruct the progress of the plaintiff's omnibus, which was thereby overturned In an action for negligence it was held that if the act of driving across to obstruct the plaintiff s omnibus, although a reckless driving was nevertheless an act done in the course of the drivers service and to

[1] *Abrahams* v *Deakin* [1891] 1 Q B 516 *Hanson* v *Waller* [1901] 1 K B 390

[2] *Gray* v *Fiddian* (1891) 15 Mad. 73

[3] *Limpus* v *London General Omnibus Co* (1862) 1 H & C 526 *Ward* v *London General Omnibus Co* (1873) 42 L J C P 265 *Black* v *Christchurch Finance Co* [1894] A C 48 *Giblan* v *Nat Amal Lab Union of Gr Brit & Ireland* [1903] 2 K B 600 *Isuar Chunder Santra* v *Satish Chunder Giri* (1902) 30 Cal. 207

[4] *Goh Choon Seng* v *Lee Kim Soo* [1925] A C 550

[5] *Green* v *Macnamara* (1859) 1 L T 9

[6] *Richards* v *The W M Water works Co* (1885) 15 Q B D 660 but see *Furlong* v *S L T Co* (1884) 1 Cab & E 316

[7] See *Uma Parshad* v *Secretary of State* (1936) 39 P L R 815

[8] *Raghunathrao* v *Motiram* (1933) 30 N L R 101

[9] *Sarat Chandra Roy* v *Dawlat Singh* (1905) 10 C W N 723

do that which he thought best for the interest of his master the master was responsible.[1]

Fraud of servant —A master is answerable for the fraud of his servant acting within the scope of his authority whether the fraud is committed for the benefit of the master or for the benefit of the servant[2] The only difference between the case where the principal receives benefit of the fraud and the case where he does not is that in the latter case the principal is liable for the wrong done to the person defrauded by his agent acting within the scope of his agency in the former case he is liable on that ground and also on the ground that by taking the benefit he has adopted the act of his agent he cannot approbate and reprobate.[3] Unless the fraud itself falls within the actual or the implied authority of the agent it is not necessarily the fraud of the principal No sensible distinction can be drawn between the case of fraud and the case of any other wrong[4] The master however is not liable where the servant has used his position to effect the fraud but had no authority express or implied to do the acts in question[5]

Delegation of duty —A servant employed for a particular purpose can have no authority to delegate the performance of his duty to another person, unless there is an urgent necessity for so doing It is not for instance within the scope of a coachman s employment to delegate the duty of driving to other persons The doctrine of authority by reason of necessity is confined to certain well known exceptional cases such as those of the master of a ship or the acceptor of a bill of exchange for the honour of the drawer

To constitute a person an agent of necessity he must be unable to communicate with his employer[6]

While the defendants omnibus was being driven by their servant a policeman thinking that the driver was drunk ordered him to discontinue driving the omnibus being then only a quarter of a mile from the defendants yard

[1] *Limpus* v *L G O Co* (1862) 1 H & C 526

[2] *Barwick* v *English Joint Stock Bank* (1867) L R. 2 Ex 259 *Lloyd* v *Grace Smith & Co* [1912] A. C 716 overruling the dicta of Bowen L J in *British Mutual Banking Co* v *Charnwood Forest Ry* (1887) 18 Q B D 714 718 and of Lord Davey in *Ruben* v *Great Fingall Consolidated* [1906] A C 439 445 See *Partab Narain* v *The Jute Mills* (1927) 50 All. 29

[3] Per Lord Macnaghten in *Lloyd* v *Grace Smith & Co* sup

[4] Per Willes J in *Barwick* v *English Joint Stock Bank*, sup p 265 *Mackay* v *Commercial Bank of New Brunswick* (1874) L. R 5 P C 394 *Houldsworth* v *City of Glasgow Bank* (1880) 5 App Cas 317 *Sherjan Khan* v *Alimuddi* (1915) 43 Cal 511

The case of *Gopal Chandra Bhattacharjee* v *Secretary of State for India* (1909) 36 Cal 647 so far as it says that the fraud of the agent should be for the benefit of the principal cannot be upheld in view of the decision in *Lloyd* v *Grace Smith & Co* sup It has been dissented from in *Dinabandhu Saha* v *Abdul Latif Molla* (1922) 50 Cal 258

[5] *Farquharson* v *King* [1902] A. C 325

[6] *Gwilliam* v *Twist* [1895] 2 Q B 84 See *Jebara* v *Ottoman Bank* [1927] 2 K B 254 270

benefit to the Government nor was there any ratification or adoption of it it was held that no suit could lie against the Government to recover damages arising from such act [1] A postmaster was accused of embezzlement and was convicted of that offence by a Court of Session He sued the Government for damages on the ground that the conviction was wrongful It was held that no suit lay since the act of prosecution was an act of the Government in exercise of its sovereign power [2]

Responsibility of servant supplying association—If an association undertake to supply competent servants and if they exercise ordinary care and skill in the selection of the servants their responsibility is at an end and they are not liable for the failure of the servants to exercise due care and skill

The defendants were an association whose object was to provide for the supply of duly qualified nurses to attend on sick persons. The nurses while engaged in nursing a patient were to be regarded as employed by that person The plaintiff was supplied with two nurses and through their negligence a hot water bottle came when very highly heated into immediate contact with the plaintiff s body and she was severely burnt It was held that the nurses were not acting as the servants of the association and the defendants were not therefore liable in respect of negligence of the nurses [3]

(2) LIABILITY OF SERVANT TO THIRD PERSONS

Whoever commits a wrong is liable for it himself and it is no excuse that he was acting as an agent or servant on behalf of and for the benefit of another Not even the command of the King himself can excuse the doing of an illegal act If the servant is a tort feasor no authority that he can derive from his master can excuse him from being liable in an action.[4] When that person is also liable the party wronged has his remedy against both or either of them at his choice [5]

(3) LIABILITY OF MASTER TO SERVANT

The liability of a master to his servant for injuries caused to the servant during service arises in three different ways —(1) At common law (2) under the Employers Liability Act 1880 and (3) under the Workmen s Compensation Act 1925

(1) *Common law*

A master is not liable to his servant for injuries received from any ordinary risk of or incident to the service including acts or defaults of any other person employed in the same service Thus in the leading

[1] *Shivabhajan Durga Prasad* v *Secretary of State* (1904) 6 Bom. L R 65 28 Bom 314

[2] *Mata Prasad* v *Secretary of State for India in Council* (1929) 5 Luck 157

[3] *Hall* v *Lees* [1904] 2 K B 602

[4] Per Holt C J in *Lane* v *Cotton* (1701) 12 Mod 472 488 *Bennett* v *Bayes* (1860) 5 H & N 391 400

[5] *Sri Rajah Bommadevara* v *Putman* (1898) 8 M L J 185

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lodge Priestly v Fowler[1] for an injury to the thigh sustained by a ing to the breaking down of an overloaded carriage in which was riding on his master s business the master was held not

rant who engages for the performance of services for compen es as an implied part of the contract take upon himself as himself and his master the natural risks and perils incident to rmance of such services the presumption of law being that the ition was adjusted accordingly or in other words that those risks are considered in his wages And where the nature of the service is such that as a natural incident to that service, the person undertaking it must be exposed to risk of injury from the negligence of other servants of the same employer this risk is one of the natural perils which the servant by his contract takes upon himself as between him and his master and consequently he cannot recover against his master for an injury so caused because, he does not stand towards him in the relation of a stranger but is one whose rights are regulated by contract express or implied[2] When several workmen engage to serve a master in a common work, they know or ought to know the risks to which they are exposing themselves including the risks of carelessness against which their em ployer cannot secure them and they must be supposed to contract with reference to such risks[3]

Leading case—PRIESTLY v FOWLER

Risk known to the servant—Where the plaintiff fell in an insufficiently fenced cooling vat at the defendant s his employer s brewery and it was found that both the plaintiff and defendant knew of the defect it was held that the maxim *volenti non fit injuria* applied and therefore the plaintiff could not recover[4]

Doctrine of common employment—A master is not liable for injury caused by the negligence of a servant to a fellow servant engaged in a common employment with him[5] The employment must be common in the sense that the safety of the one servant must in the ordinary and natural course of things depend on the care and skill of the others[6]

To constitute fellow servants within the meaning of this doctrine, it is not necessary that the servant causing and the servant sustaining the

[1] (1837) 3 M & W 1 *Wigmore* v *Jay* (1850) 5 Ex 354 *Hutchinson* v *Y N & B Ry* (1850) 5 Ex 343 *Wiggett* v *Fox* (1856) 11 Ex 832

[2] Per Blackburn J in *Morgan* v *Vale of Neath Ry* (1864) 5 B & S 570 578 on appeal (1865) L R 1 Q B 149 *Tunney* v *Midland Ry* (1866) L R 1 C P 291 296 *Waller* v *S E Ry* (1863) 2 H & C 102

[3] Per Lord Cranworth in *Barton shill Coal Co* v *Reid* (1858) 3 Macq H L 266 277 295

[4] *Thomas* v *Quartermaine* (1887) 18 Q B D 685 *Hayward* v *Drury Lane Theatre Ltd* [1917] 2 K B 899

[5] *Johnson* v *Lindsay & Co* [1891] A C 371 *Cameron* v *Nystrom* [1893] A C 308

[6] *Morgan* v *Vale of Neath Ry Co* (1864) 5 B & S 570 580 *Charles* v *Taylor* (1878) 3 C P D 492

injury shall both be engaged in precisely the same, or even similar acts Thus the driver and guard of a stage-coach the steersman and the rowers of a boat the man who draws the red hot iron from the forge and those who hammer it into shape the engine man and the switcher the man who lets the miners down into and who afterwards brings them up from the mine and the miners themselves all these are fellow labourers or collaborateurs within the meaning of this doctrine.[1] It is necessary however in each particular case to ascertain whether the servants are fellow labourers in the same work Where servants therefore, are engaged in different departments of duty an injury committed by one servant upon the other by carelessness or negligence in the course of his peculiar work is not within the exception and the master's liability attaches in that case in the same manner as if the injured servant stood in no such relation to him.[2] Workmen do not cease to be fellow workmen because they are not all equal in point of station or authority [3]

The defence of common employment is not applicable in a case where injury has been caused to a servant by the breach of an absolute duty imposed by a statute upon his master for his protection [4] Similarly it does not apply as between fellow workmen A servant will be liable to another servant in respect of negligence in a common employment.[5]

In British India there is no legislation analogous to the Employers Liability Act According to the Allahabad and Calcutta High Courts the

[1] Per Lord Cranworth in *Bartonshill Coal Co v Reid* (1858) 3 Macq H L 266 295 All persons engaged under the same employer for the purposes of the same business, however different in detail those purposes may be are fellow servants in a common employment e g a carpenter doing work on the roof of an engine shed and porters moving an engine on a turn table (*Morgan v Vale of Neath Ry* (1865) L R 1 Q B 149) a chief engineer and one of the ordinary seamen employed by the same company (*Searle v Lindsay* (1861) 11 C B N S 429) a railway guard and a ganger of plate layers in the service of the same company (*Waller v South Eastern Ry* (1863) 2 H & C 102) the master of a ship and one of the sailors employed by the same company (*Hedley v The Pinkney & Sons Steamship Co* [1894] A C 222) one of a gang of scaffolders and the foreman of the gang (*Gallagher v Piper* (1864) 16 C B N S 669) a manager of barges and a man employed in lowering sacks (*Lovell v Howell* (1876) 1 C P D 161) But a compulsory pilot is not a fellow servant of the crew (*Smith v Steele* (1875) L R 10 Q B 125) nor are the crew of a tug and the crew of the tow (*Bland v Ross* (1860) 14 Moor P C 210 *Spaight v Tedcastle* (1881) 6 App Cas 217) nor the masters and crew of two different ships belonging to the same owners (*The Petrel* [1893] P 320) See *Blanchette v Secretary of State for India* (1912) 9 A L J 173 The master and chief steward of a ship on the one hand and a laskar on the other are not in common employment (*T & J Brocklebank v Noor Ahmode* (1937) 42 C W N 179)

[2] Per Lord Chelmsford L C in *Bartonshill Coal Co v McGuire* (1858) 3 Macq 300 307

[3] Per Lord Cranworth in *Wilson v Merry* (1868) L R 1 H L (Sc) & Div 326 334

[4] *Groves v Wimborne (Lord)* [1898] 2 Q B 402 *David v Britannic Merthyr Coal Company* [1909] 2 K B 146 *Butler v Fife Coal Co* [1912] A C 149

[5] *Lees v Dunkerley Brothers* [1911] A C 5

doctrine of common employment applies in India [1] according to the Nagpur High Court it does not.[2]

Common employment—The plaintiff was in the service of a theatre company On the close of a performance the plaintiff was in leaving the stage passing by a place where scene lifters were shifting the scenery when she was injured by something which fell on her head. It was held that the plaintiff could not recover damages as the injury was occasioned by the negligence of a fellow employee and the doctrine of common employment was applicable [3] The plaintiff a girl of fifteen years was employed in the defendants cartridge factory in the work of testing gauge of loaded cartridges She worked under a forewoman whose duty it was to give her proper instructions and warning as to the dangerous nature of the work and in consequence of the forewoman s negligent failure to do so the plaintiff caused the cartridge to explode thereby sustaining personal injuries in respect of which she sued the defendants It was held that the doctrine of common employment applied and the defendants were not liable as the negligence of the foreman is a risk which a fellow servant even though an infant takes upon himself [4] Colliery proprietors who possessed a railway in connection with the colliery ran a train thereon for the carriage of their colliers free of charge from the colliery towards their houses after the day's work. One of the colliers while being so carried met his death through an accident occasioned by the negligence of servants of his employers engaged in the repair of a bridge over the railway It was held that the deceased must as between himself and his employers be deemed to have undertaken the risk of such an accident and that the colliery proprietors were not liable [5]

At common law the following duties are imposed on masters or employers —

1 The master is bound to provide proper and competent fellow servants [6] He must use reasonable care in the selection of his servants[7] who must possess ordinary skill and care [8] But he is not bound to warrant the competency of his servants [9]

2 The master must furnish them with adequate materials and resources for the work [10] On the master rests the duty of taking reasonable care to provide appliances and to maintain them in a proper condition and so to carry on his operations as not to subject those employed by him to unnecessary risk [11] Thus a master is held liable for supplying

[1] *Blanchette v Secretary of State for India* (1912) 9 A L J 173 *T & J Brocklebank v Noor Ahmode* (1937) 42 C W N 179 *Secretary of State for India v Rukhmini Bai* [1938] Nag 54

[3] *Burr v Theatre Royal Drury Lane Ltd* [1907] 1 K B 544

[4] *Cribb v Kynoch* [1907] 2 K B 548 *Young v Hoffman Manufacturing Company Limited* [1907] 2 K B 646

[5] *Coldrick v Partridge Jones & Co Limited* [1910] A C 77

[6] *Wilson v Merry* (1868) L R 1 H L (Sc) & Div 326

[7] *Tarrant v Webb* (1856) 18 C B 797 *Bartonshill Coal Co v Reid* (1858) 3 Macq H L 266

[8] *Wigmore v Jay* (1850) 5 Ex 354

[9] *Tarrant v Webb* sup

[10] *Wilson v Merry* (1868) L R 1 H L (Sc) & Div 326 332

[11] Per Lord Herschell in *Smith v Baker & Sons* [1891] A C 325 See *South Indian Industrials Ltd v Alamelu Ammal* (1923) 17 L W 495

a bad rope for staging to paint a ship[1] or a motor car the starting gea of which was defective.[2] A negligent system or a negligent mode of using perfectly sound machinery may make the employer liable quite apar from any of the provisions of the Employers Liability Act[3] He is no bound to adopt all the latest improvements and appliances it is a questior of fact in each particular case whether there has been a want of reasonabl care in failing to install the appliance the absence of which is alleged t constitute negligence[4]

An employer does not warrant to his employees that the plant an property used in his business are safe he only undertakes that he wi use reasonable care to see that they are safe and he fulfils this obli gation by using reasonable care to appoint persons of competent care an skill as his delegates to provide and use the plant and property require for the business he supplying them with the necessary financial mean for this purpose. If the employer satisfies these conditions he is no liable for injury caused to one of his servants by the negligence of suc a delegate in the use of the plant[5]

3 The master is bound to take all reasonable precautions t secure the safety of his servants or workmen[6] If hidden and secre dangers exist upon his premises known to him and unknown to his work men it is his duty to disclose them to the latter that they may tak precautions against them[7]

4 The master is responsible for his own negligence causing injur to the servants[8] Such negligence may be brought home to the maste by showing either his personal interference to be the cause of the acciden or that he negligently retained incompetent servants whose incompetenc was the cause of the accident[9] The master cannot relieve himself of res ponsibility merely by delegating it to a person who is incompetent fo the task Where the master has used reasonable care to delegate, and i

Dhanlal Soorma v *Rangoon Indian Telegraph Association Ltd* (1935) 13 Ran 369

[1] *Heaven* v *Pender* (1883) 11 Q B D 503

[2] *Baker* v *James Bros & Sons Ltd* [1921] 2 K B 674 Scrutton L J says that this decision is exactly opposite of that in *Priestly* v *Fowler* (1837) 3 M & W 1 *Fanton* v *Denville* [1932] 2 K B 309 316

[3] Per Lord Halsbury in *Smith* v *Baker & Sons* [1891] A. C 325 The master is not liable if there was no failure on his part to provide competent workmen and fit tackle and machinery *Turner* v *S P & D Ry* (1875) 1 A L J 653

[4] *Toronto Power Company Ltd* v *Kate Paskuan* [1915] A C 73

[5] *Fanton* v *Denville* [1932] K B 309

[6] *Brydon* v *Stewart* (1855) Macq 30 *Paterson* v *Wallace* (1854 1 Macq 748

[7] *Williams* v *Clough* (1858) 3 H & N 258 *Cole* v *De Trafford* (N 2) [1918] 2 K B 523

[8] *Smith* v *Baker & Sons* sup *Williams* v *Birmingham Battery and Met Co* [1899] 2 Q B 338 *Cole* v *De Trafford (No 2)* [1918] 2 K B 523 *Monaghan* v *Rhodes & Son* [1920] K. B 487 *Baker* v *James Bros & Son* supra.

[9] *Ormond* v *Holland* (1858) E Bl & El 102 *Ashworth* v *Stanw* (1861) 3 El & El 701

not aware of the negligence of the delegate he is not liable for the consequences of that negligence to the fellow servant [1]

Negligence on the part of the servant would disentitle him to recover [2]

Want of precaution to secure safety of servants—Where a master ordered a servant to take a bag of corn up a ladder which the master knew and the servant did not know to be unsafe and the ladder broke and the servant was injured, the master was held liable [3] Where the defendants well knowing that certain carcasses were diseased and infectious employed the plaintiff who was ignorant of that fact to cut them up whereby the plaintiff was infected by the disease and suffered injury therefrom it was held that the defendants were liable [4]

Indian case—The defendants for the purpose of their business adopted a method of breaking up cast iron by dropping heavy weight from a height of thirty five feet on pieces of iron resting on a bed of iron in a pit fenced round by a fencing three feet high The plaintiff's husband who was working under the defendants at a distance of seventy or eighty feet from the pit was killed by a piece of iron that flew out from the pit It was held that the defendants were liable to pay compensation to the plaintiff [5] Where the master and chief steward of a ship had been negligent in the matter of taking reasonable and proper care of a sailor during his illness on board it being their duty to take such care with the result that the latter had been incapacitated for active service for the rest of his life it was held that the owner of the ship was liable for their negligence [6]

Volunteers—The rule of law that a master is not in general responsible to his servant for injury occasioned by the negligence of a fellow servant in the course of their common employment applies to the case of a person who is injured whilst voluntarily assisting the servants in their work [7] Even if a stranger is invited by a servant to assist him in his work and is injured by the negligence of another servant of the same master he cannot by volunteering his assistance impose upon the master a greater liability than that in which he stands towards his own servant [8] But it is not in every case where a party works with the servants of another for a common purpose that he becomes a volunteer so as to prevent him from maintaining an action [9] A passer by for instance who

[1] *Fanton v Denville* [1932] 2 K B 309 326

[2] *Hoey v Dublin & Belfast Junction Ry* (1870) Ir R 5 C L 206 *Senior v Ward* (1859) 1 El & El 385

[3] *Williams v Clough* (1838) 3 H & N 258

[4] *Davies v England* (1864) 33 L J Q B 321 *Mellors v Shaw* (1861) 1 B & S 437 30 L J Q B 333 *Williams v Birmingham B & M Co* [1899] 2 Q B 338

[5] *South Indian Industrials Ltd v Alamelu Ammal* (1923) 17 L W 495

[6] *T & J Brocklebank Ltd v Noor Ahmode* (1937) 47 C W N 179

[7] *Degg v Midland Ry* (1857) 1 H & N 773 *Bromiley v Collins* [1936] 2 All E R 1061

[8] *Potter v Faulkner* (1861) 1 B & S 800

[9] *Abraham v Reynolds* (1860) 5 H & N 143

is casually appealed to by a workman for information respecting a thing which the latter is doing in a public thoroughfare is not to be considered a volunteer assistant so as to exonerate the workman's master from responsibility for an injury resulting to the former from the workman's negligent mode of doing the work[1] Similarly a person who in a transaction of common interest assists the servants of another with the master's consent can recover against the master for injuries caused by the negligence of the servants

(2) *The Employers Liability Act* 1880[3]

A very eminent Judge observed that *Priestly* v *Fowler* introduced a new chapter into the law By far the greatest blow to the practical utility of the employers common law liability was dealt by this case It decided that the principle expressed by the maxim *qui facit per alium facit per se* of universal application to other relationships should have no application to the relationship between employer and workman

In the case of injuries arising out of another servant's negligence the workmen stood before the Employers Liability Act at a disadvantage as compared with the world outside. For damage done by the negligence of his servants acting within the scope of their employment the master on the principle of *respondeat superior* was responsible to strangers But a workman injured by the negligence of a fellow workman had no such redress[4] By entering into a contract of service the common law inferred

[1] *Cleveland* v *Spier* (1864) 16 C B N S 399

[2] *Wright* v *L & N W Ry* (1876) 1 Q B D 252 (1877) 2 Q B D 271 *Holmes* v *N E Ry* (1869) L R 4 Ex 254 L R 6 Ex 123

[3] 43 & 44 Vic c 42 This was a temporary Act to last till the end of 1887 (s 10) but it has been renewed from time to time

[4] Per Bowen L J in *Thomas* v *Quatermaine* (1887) 18 Q B D 685 691

By the Employers Liability Act 1880 a railway servant or any person to whom the Employers and Workmen Act 1875 applies i e any labourer servant in husbandry journeyman artificer handicraftsman miner or a person otherwise engaged in a manual labour not being a domestic or menial servant or a seaman can bring an action against his employer where personal injury is caused to him from any of the following causes —

(1) By reason of any defect in the condition of the ways works machinery, or plant connected with or used in the business of the employer or

(2) By reason of the negligence of any person in the service of the employer who has any superintendence intrusted to him whilst in the exercise of such superintendence or

(3) By reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform and did conform where such injury resulted from his having so conformed or

(4) By reason of the act or omission of any person in the service of the employer done or made in obedience to the rules or byelaws of the employer or in obedience to particular instructions given by any person delegated with the authority of the employer in that behalf or

(5) By reason of the negligence of any person in the service of the employer who has the charge or control of any signal points locomotive engine or train upon a railway —

that he had taken on himself the ordinary risks incident to such business as was lawfully carried on upon his master s premises

The Employers Liability Act was passed to obviate the injustice to workmen that employers should escape liability where persons having superintendence and control in the employment were guilty of negligence causing injury to the workmen The doctrine of common employment had become very unpopular with the working class The object of the Act was to get rid of the inference arising from the fact of common employment with respect to injuries caused by any person belonging to the specified classes. The Act was enacted for seven years but has since been continued from time to time

The Employers Liability Act has affected the position of the master when sued by a workman in this way The workman when he sues his master under the provisions of the Act for any of the five matters designated in it is in the position of one of the public suing and is not in the position of a servant theretofore was when he sued his master in other words the master shall have all the defences he theretofore had against any one of the public suing him but shall not have the special defence of common employment

The sum recoverable as compensation is limited to three years average earnings [1] The injured servant or his representatives must give notice[2] of his claim to the employer within six weeks of the accident unless in the case of death the Judge thinks there was reasonable excuse for not giving it Money payable under penalty is to be deducted from compen

(1) The workman or in case the injury results in death the legal personal representatives of the workman and any person entitled in case of death shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer nor engaged in his work

(2) A workman shall not be entitled under this Act to any right of compensation or remedy against the employer in any of the following cases that is to say

(1) Under sub section one of section one unless the defect therein mentioned arose from or had not been discovered or remedied owing to the negligence of the employer or of some person in the service of the employer and intrusted by him with the duty of seeing that the ways works machinery or plant were in proper condition

(2) Under sub section four of section one unless the injury resulted from some impropriety or defect in the rules byelaws or instructions therein mentioned provided that where a rule or byelaw has been approved or has been accepted as a proper rule or byelaw by one of Her Majesty s principal Secretaries of State or by the Board of Trade or any other department of the Government under or by virtue of any Act of Parliament it shall not be deemed for the purposes of this Act to be an improper or defective rule or byelaw

(3) In any case where the workman knew of the defect or negligence which caused his injury and failed within a reasonable time to give or caused to be given information thereof to the employer or some person superior to himself in the service of the employer unless he was aware that the employer or such superior already knew of the said defect or negligence

[1] Section 3

[2] Stating the cause of injury and the date at which it was sustained—s 7

sation under the Act[1] The action must be commenced by the injured servant within six months or by his personal representatives (if he is killed) within twelve months

It is however competent to a workman to contract with his employer not to claim compensation for personal injuries under the Act[3]

This Act has not in any way affected the application of the maxim *volenti non fit injuria* and if a man voluntarily undertakes with his eyes open exceptional risk incident to an employment he cannot recover in respect of injuries arising thence, unless his employer has been guilty of a breach of duty such as that referred to in the proviso to section 1 In order that a man be *volens* mere knowledge of the danger will not do there must be an assent on the part of the workman to accept the risk with a full appreciation of its extent to bring the workman within the maxim[4]

There is no enactment in British India similar to this Act

(3) *The Workmen s Compensation Act* 1925

The Act provides for compensation to workmen by employers in the cases to which the Act extends for accidental injuries and death The obligation to compensate is independent of any negligence on the part of employees or fellow servants The Act in effect compels employers to insure their servants against accidental injuries and death The insurance is not compulsory but it is obvious that employers could hardly do having regard to the obligation upon them by the Act without insuring their workmen against these risks

Under this Act[5] the workman is in a more favourable position than a stranger Where a workman sues his employer for injuries sustained by an accident arising out of and in the course of his employment the employer cannot set up the defence of (1) *volenti non fit injuria* or (2) inevitable accident or (3) contributory negligence on the part of the workman[6]

The Indian Act is more or less on the same lines It is mainly based on the English Act of 1906 which was superseded by the Act of 1925

Neither the English nor the Indian Act belongs to the domain of the law of torts They both stand outside that law

Remedies open to a workman—An injured workman has three courses open to him to recover compensation (1) at common law (2)

[1] The Employers Liability Act 1880 s 5
[2] *Ibid* s 4
[3] *Griffiths* v *The Earl of Dudley* (1882) 9 Q B D 357
[4] Per Lord Esher M R in *Yarmouth* v *France* (1887) 19 Q B D 647 *Thomas* v *Quartermaine* (1887) 18 Q B D 685 *Smith* v *Baker and Sons* [1891] A C 325
[5] This Act repeals all previous Workmen s Compensation Acts.
[6] See *Simpson* v *L M & S Ry Co* [1913] A C 351

under the Employers Liability Act and (3) under the Workmens Compensation Act of 1925 in England and the Workmens Compensation Act 1923[1] in British India

(4) LIABILITY OF SERVANT TO MASTER

A servant is no doubt liable to his master though not to others for the consequences of his non feasances or wrongful omissions[2] If damages have been recovered from the master by reason of the servants negligence in doing the masters work or in executing his orders these damages can be recovered by the master from the servant

A servant who while still in the service of his master solicits the customers of his master to transfer their custom to himself even though that transfer is to take effect only after the service has terminated commits a breach of his duty to his master and for that breach he is liable in damages[3] Plaintiffs servant was sent to a bank to pay in the plaintiffs money He returned saying he had lost the money on the way There was no proof that the money was stolen from him. It was held that the servant not having taken due care and caution of his masters money was guilty of negligence and was liable to repay it[4]

II *Owner and Independent Contractor*

No one can be made liable for an act or breach of duty unless it be traceable to himself or his servant or servants in the course of his or their employment Consequently if an independent contractor is employed to do a lawful act and in the course of the work he or his servants commit some casual act or wrong or negligence the employer is not answerable[5]

An independent contractor is one who undertakes to produce a given result without being in any way controlled as to the method by which he attains that result In the actual execution of the work he is not under the order or control of the person for whom he does it but uses his own discretion in things not specified beforehand

Employer's right to inspect works to decide as to the quality of materials and workmanship to stop the works or any part thereof at any stage to modify and alter them and to dismiss disobedient or incompetent workmen employed by the contractor does not render him liable

[1] Act VIII of 1923

[2] In *A C Mukerjee v Municipal Board Benares* (1923) 22 A L J 26 the secretary of the Board was held liable for misappropriation of funds by his subordinate whom he implicitly trusted A servant *is not* liable in damages for the loss caused to his master by leaving his employ without notice *Maung Aung Tha v Maung Ba Than* (1925) 4 Bur L J 72

[3] *Wessex Dairies Ld v Smith* [1935] A C 80

[4] *Abdulla Sheriff v Mahomed Aba* (1926) 28 Bom L R 500 See *Kishenprasad v Rajaram* (1925) 27 Bom L R 1159

[5] *Pickard v Smith* (1861) 10 C B N S 470 480 *Morgan v Girls Friendly Society* [1936] 1 All E R 404

to third persons for the negligence of the contractor in carrying out the works[1]

Exceptions —There are five exceptions to the rule that a person employing a contractor is not liable for his (contractor s) wrongful acts —

1 Where the employer retains his control over the contractor and personally interferes and makes himself a party to the act which occasions the damage

B, the owner and occupier of premises adjoining a highway employed C to make a drain therefrom to communicate with the common sewer In the performance of this work the workman employed by C placed gravel on the highway in consequence of which A in driving along the road sustained personal injury Before the accident the dangerous position of the heap was pointed out to B who promised to remove it C had the sole management of the work and employed and paid D to cart away part of the rubbish at a certain price per load and had charged B in his bill with the sum so paid It was held that B was liable to A[3]

2 Where the thing contracted to be done is itself wrongful In such a case the employer is responsible for the wrong so done by the contractor or his servants and is liable to third persons who sustain damage from the wrong doing[4] For instance if a man employs a contractor to build a house who builds it so as to darken another person s windows the remedy is not against the builder but the owner of the house

A gas company not authorized to interfere with the streets of Sheffield directed their contractor to open trenches therein The contractor s servant in doing so left a heap of stones over which the plaintiff fell and was injured It was held that the defendant company was liable as the interference with the streets was in itself a wrongful act[5]

3 Where legal or statutory duty is imposed on the employer, he is liable for any injury that arises to others in consequence of its having been negligently performed by the contractor[6]

No one can get rid of such a duty by imposing it upon an independent contractor The employer remains liable to those who are injured by the non performance of the duty even though the contractor has agreed to indemnify him[7]

1 *Reedie* v *L & N W Ry* (1849) 4 Ex 244 *Hardaker* v *Idle District Council* [1896] 1 Q B 335

2 *Burgess* v *Gray* (1845) 1 C B 578

3 *Burgess* v *Gray* ibid *Union Steamship Co* v *Claridge* [1894] A C 185

4 *Ellis* v *Sheffield Gas Consumers Co* (1853) 2 E & B 767

5 *Ibid*

6 *Hole* v *Sittingbourne Ry* (1861) 6 H & N 488 *Gray* v *Pullen* (1864) 5 B & S 970 *Pickard* v *Smith* (1861) 10 C B N S 470 *Tarry* v *Ashton* (1876) 1 Q B D 314 *Dalton* v *Angus* (1881) 6 App Cas 740 831 *Hardaker* v *Idle District Council* [1896] 1 Q B 335 *The Snark* [1900] P 105 *Maxwell* v *British Thomson Houston Co* (1902) 18 T L R 278 *Matania* v *National Provincial Bank* [1936] 2 All E R 633

7 *Bower* v *Peate* (1876) 1 Q B D 321 326 *Gray* v *Pullen* sup

If a man does work on or near another's property which involves danger to that property unless proper care is taken he is liable to the owners of the property for damage resulting to it from failure to take proper care and is equally liable if instead of doing the work himself he procures another to do it for him [1]

Where a person employs a contractor to do work in a place where the public are in the habit of passing which work will unless precautions are taken, cause danger to the public, an obligation is thrown upon the person who orders the work to be done to see that the necessary precautions are taken and that if the necessary precautions are not taken he cannot escape liability by seeking to throw the blame on the contractor [2] It is the duty of a person who is causing such work to be executed to see that they are properly carried out so as not to occasion any damage to persons passing by on the highway [3]

Two houses adjoined built independently but each on the extremity of its owner's soil and having lateral support from the soil on which the other rested This continued for twenty years and afterwards some alterations were made in one of the buildings openly and without deception. More than twenty years after the alterations the owners of the adjoining house employed a contractor to pull down their house and excavate the contractor being bound to shore up adjoining buildings and make good all damage The contractor employed a sub-contractor upon similar terms. The house was pulled down and the soil under it excavated to a depth of several feet, and the plaintiffs stack being deprived of the lateral support of the adjacent soil sank and fell bringing down with it the plaintiffs house It was held that the plaintiffs were entitled to damages from the owners of the adjoining house and the contractor for the injury [4] A district council employed a contractor to construct a sewer for them In consequence of his negligence in carrying out the work a gas-main was broken and the gas escaped from it into the house in which the plaintiffs (a husband and wife) resided and an explosion took place by which the wife was injured and the husband's furniture was damaged. In an action by the plaintiffs against the district council and the contractor it was held that the district council owed a duty to the public (including the plaintiffs) so to construct the sewer as not to injure the gas main that they had been guilty of a breach of [illegible] duty that notwithstanding that they had delegated the performance of [illegible] duty to the contractor they were responsible to the plaintiffs for the [illegible] A was empowered under an Act to make a drain from his pr[illegible] sewer by cutting a trench across a highway and filling it up after [illegible] should be completed For this purpose he employed a contractor [illegible] negligence it was filled up improperly in consequence of which dar[illegible]

[1] *Honeywill and Stein Ld* v *Larkin Brothers Ld* [1934] 1 K B 191 199

[2] *Penny* v *Wimbledon Urban District Council* [1899] 2 Q B 72 76

[3] Per Smith L J in *Holliday* v *National Telephone Co* [1899] 2 Q B 399 400 *Pickard* v *Smith* (1861) 10 C B N S 470

[4] *Dalton* v *Angus* [illegible] Cas. 740

[5] *Hardakar* v *Idle* [illegible] cil [1896] 1 Q B [illegible] *National Telephone Co* [illegible] *Snark* [1900] P 10[illegible] [1893] A C. 492

to B It was held that A was responsible in an action by B[1] Where the defendants a railway company were authorized by an Act of Parliament to construct a railway bridge across a navigable river and they employed a contractor to construct a bridge but before the works were completed the bridge, from some defect in its construction could not be opened and the plaintiff's vessel was prevented from navigating the river it was held that the defendants were liable for where a person is authorized by an Act of Parliament or bound by contract to do a particular work he cannot avoid responsibility by contracting with another person to do that work and the maxim *qui facit per alium facit per se* applied Defendant was the occupier of a house from the front of which a heavy lamp projected several feet over the public foot pavement As plaintiff was walking along in November the lamp fell on her and injured her In the previous August the defendant had employed an experienced gas-fitter to put the lamp in repair The fastening by which the lamp was attached to the post was in a decayed state. It was held that the plaintiff was entitled to recover damages for the injury caused. A person maintaining a lamp projecting over a highway for his own purposes was bound to maintain it so as not to be dangerous to the public and if it caused injury owing to want of repair it was no answer on his part that he employed a competent person to put it in a state of repair[3] A contractor was employed to make up a road and in carrying out the work he negligently left on the road a heap of soil unlighted and unprotected A person walking along the road after dark fell over the heap and was injured. It was held that his employers were liable because from the nature of the work danger was likely to arise to the public using the road unless precautions were taken[4]

Indian cases—The plaintiff claimed to recover Rs 63 500 for damage sustained by him in consequence of his having fallen into a hole dug on the land of the first defendants by an employee of the second defendant who had agreed to take the land on lease The plaintiff occupied a house near the land and had been in the habit of crossing the land daily in going to and from his place of business. There was a regularly constructed road from his house to the high road which he might have used but, as a short cut he and others were in the habit of using the beaten track across the land On one day the plaintiff had gone to his place of business as usual by the short cut across the land while returning at about 11 o clock at night he fell into a hole which had been dug during the day right across the pathway by the employee of the second defendant It was held that there had been negligence on the part of the employee of the second defendant for which the second defendant alone was liable and a sum of Rs 17 000 was awarded as damages.[5] The plaintiff was driving a buggy along a street in Calcutta by night and fell into a hole opened in the road which was left unfenced and insufficiently lighted and was badly injured. It appeared that the road had been opened by an engineer in the employment of the Government who had applied to and obtained permission from the Cor

1 *Gray* v *Pullen* (1864) 5 B & S 970

2 *Hole* v *Sittingbourne and Sheerness Ry* (1861) 6 H & N 488

3 *Tarry* v *Ashton* (1876) 1 Q B D 314

4 *Penny* v *Wimbledon Urban District Council* [1899] 2 Q B 72 *Clements* v *County Council of Tyrone* [1905] 2 I R. 415

5 *Evans* v *Trustees of the Port of Bombay & Sirdar Dilar Dowlat* (1886) 11 Bom. 329

poration to open the road subject to the condition that he employed one of the contractors licensed by the Municipality to do such works and such a contractor had been employed The plaintiff sued for damages making the Secretary of State the Corporation and the contractor defendants It was held that the Secretary of State was not liable because he came within the established rule that one who employs another to do what is perfectly legal must be presumed to employ that other to do this in a legal way that the Corporation who had a statutory obligation imposed upon them to repair and maintain the roads were liable to the plaintiff for a breach of their statutory duty and that the contractor also was liable [1]

4 Where the work contracted to be done is from its nature likely to cause danger to others there is a duty on the part of the employer to take all reasonable precautions against such danger and the contractor does not take these precautions e g interference with a neighbour s right of support The employer in such a state of circumstances is liable because it is his duty to use every reasonable precaution that care and skill may suggest in the execution of his works so as to protect his neighbours from injury and he cannot get rid of the responsibility thus cast on him by transferring that duty to another He is not in the actual position of being responsible for injury no matter how occasioned but he must be vigilant and careful for he is liable for injuries to his neighbour caused by any want of prudence or precaution [3] To escape liability in such cases the employer must show that the contractor was not acting within the scope of his contract but was a trespasser when he did the act complained of [4]

Defendant liable —Where the defendant employed a contractor to pull down an old house and erect a new one and the contractor expressly undertook to support the plaintiff s house and to be liable for all damage it was held that the defendant was liable for the damage [5] The defendant employed a contractor to take down his house and rebuild it The contractor in fixing a staircase negligently cut into the party wall between the defendant s house and the adjoining house of B and this caused the defendant s house to fall and to damage the plaintiff s house It was held that the defendant was liable upon the ground that the work ordered by him was necessarily attended with risk to the plaintiff s house and that it was therefore the defendant s duty to see that proper precautions were taken to prevent injury to that house and that he could not get rid of responsibility by delegating the performance to a third person [6]

Where the plaintiffs had procured the defendants as independent contractors,

[1] *Corporation of Calcutta* v *Anderson* (1884) 10 Cal 445 *Keough* v *Municipal Committee of Lahore* (1893) P R No 108 of 1893 See *Municipal Committee of Lahore* v *Nand Lal* (1913) P R No 88 of 1913 where a Municipality wa held liable for the bursting of a main S e *Municipal Council of Vizagapatam* v *Foster* (1917) 41 Mad 538

[2] *Hughes* v *Percival* (1883) 8 App Cas. 443 *Bower* v *Peate* (1876) 1 Q B D 321 *Dalton* v *Angus* (1881) 6 App Cas. 740 *Penny* v *Wimbledon Urban Dis Council* [1899] 2 Q B 72 78

[3] *Hughes* v *Percival* sup

[4] *Black* v *Christchurch Finance Co* [1894] A C 48 p 455

[5] *Bower* v *Peate* sup *Lemaitre* v *Davis* (1881) 19 Ch D 281

[6] *Hughes* v *Percival* supra over ruling *Butler* v *Hunter* (1862) 7 I

to take photographs of the interior of a cinematograph theatre and owing to the defendants negligence the premises were damaged by fire it was held that the plaintiffs were liable to the owners of the theatre for the damage and were entitled to recover what they paid from the defendants.[1]

Leading cases — QUARMAN v BURNETT REEDIE v L. & N W RY

Defendant not liable—In the first leading case two ladies being possessed of a carriage of their own were furnished by a job-master with a pair of horses and a driver by the day to drive They gave the driver a gratuity for each days drive and provided him with a livery hat and coat which were kept in their house and after he had driven them constantly for three years, and was taking off his livery in their hall the horse started off with the carriage and inflicted an injury upon the plaintiff It was held that the ladies were not responsible as the coachman was not their servant but the servant of the job master

In the second leading case a company empowered to construct a railway contracted with certain persons to make a portion of the line, and by the contract reserved to themselves the power of dismissing any of the contractor's workmen for incompetence and the workmen in constructing a bridge over a highway negligently caused the death of a person passing beneath along the highway by allowing a stone to fall upon him It was held in an action against the company by the administratix of the deceased that they were not liable[3]

5 Under the provisions of s 6 of the Workmens Compensation Act 1925 if the principal as therein defined employs a contractor such contractor s servants are able to recover compensation from the principal without prejudice to the principal s right to be indemnified by the contractor if the contractor is himself liable under the Act There are similar provisions in the Workmens Compensation Act VIII of 1923 ss 12 (2) and 13

Sub contractor—The liability by virtue of the principle of relation of master and servant ceases when the relation itself ceases to exist and no person other than the master of such servant can be liable on the simple ground that the servant is the servant of another and his act the act of another consequently a third person entering into a contract with the master which does not raise the relation of master and servant at all is not thereby rendered liable[4]

A builder was employed to make certain alterations in a club house including the preparation and fixing of gas fittings. He sub let to a gas-fitter the work of preparing the gas fittings In consequence of the negligence of the latter or of his servants the gas exploded and injured the plaintiff It was held that the plaintiff s remedy was against the gas-fitter and not against the builder[5]

& N 826 See to the same effect *Dhondiba Krishnaji v Mun Commr of Bombay* (1892) 17 Bom 307 See also *Ullman v The Justices of the Peace of Calcutta* (1871) 8 Beng L R 265 where the contractor was not negligent.

[1] *Honeywill and Stein Ld v Larkin Brothers Ld* [1934] 1 K B 191

[2] *Quarman v Burnett* (1840) 6 M & W 499

[3] *Reedie v L & N W Ry* (1849) 4 Ex 244

[4] *Quarman v Burnett* sup *Rapson v Cubitt* (1842) 9 M & W 710

[5] *Rapson v Cubitt* ibid

III Principal and Agent

1 LIABILITY OF PRINCIPAL

The liability of the principal for the wrongful act of his agent rests on the grounds that the principal is the person who has selected the agent and that, the principal having delegated the performance of a certain class of acts to the agent the principal should bear the risk of his exceeding his authority in matters incidental to the doing of the acts.[1]

In order that responsibility may attach to the principal in respect of a tortious or fraudulent act—whether criminal or not —it is necessary

(1) that it shall have been committed by the agent in the course of his employment,[3] although the principal did not authorize or justify or participate in the act or even if he forbade it[4] or disapproved of it

(2) that if the act was beyond the scope of the agency it must have been expressly authorized by the principal or subsequently ratified[5] by him [6]

Liability —The liability of the principal for the wrongs of his agent is a joint and several liability with the agent The injured party may sue either or both of them but if he chooses to sue the agent alone and recovers judgment against him such judgment though unsatisfied is a bar to any proceedings against the principal [7]

2 LIABILITY OF AGENTS

- Agents
  - Private
    - for acts of misfeasance or positive wrongs—personally *liable to third persons*
    - for acts of non feasance or mere omissions of duty—not liable to third person but solely to his principal
  - Public
    - for malfeasance misfeasance non feasance etc.—personally liable to third persons the Government being in no case liable.

1 Private agents —A principal is bound by all the acts of his general agent but where he appoints an agent for a particular purpose he is only bound to the extent of the authority given [8]

An agent is personally liable for fraud to third persons and he cannot excuse himself on the ground that he acted as agent for the contract of agency cannot impose any obligation on him to commit or assist in the com

[1] *Hamlyn* v *Houston & Co* [1903] 1 K B 81 85

[2] *Dyer* v *Munday* [1895] 1 Q B 742

[3] *Burns* v *Poulson* (1873) L R 8 C P 563 *Thorne* v *Heard* [1895] A C 495

[4] *Collman* v *Mills* [1897] 1 Q B 396

[5] *Wilson* v *Tumman* (1843) 6 M & G 236 *Freeman* v *Rosher* (1849) 13 Q B 780 *Marsh* v *Joseph* [1897] 1 Ch 213

[6] *Lloyd* v *Grace Smith & Co* [1912] A C 716 737

[7] *Brinsmead* v *Harrison* (1872) L R 7 C P 547 *Wright* v *L G O Co* (1877) 2 Q B D 271

[8] *East India Co* v *Henseley* (1794) 1 Esp 111 *Howard* v *Braithwaite* (1812) 1 Ves & B 202 *Imperial Tobacco Co* v *Bonnan* (1927) 46 C L J 455

mitting of fraud [1] An agent charged with personal fraud cannot by disclaiming interest avoid answering fully [2]

But he is not in general liable to third persons for his own non feasances or omissions of duty in the course of his employment. His liability in these cases is solely to his principal there being no privity between him and such third persons but the privity exists only between him and his principal To this rule there is one important exception founded upon maritime law Masters of ships although agents or servants of the owners are in many respects deemed to be responsible as principals to third persons for their own negligence and misfeasance and the negligence of subordinates appointed by them

2 Public agents —The head of a Government Department is not liable for the neglect or torts of officials in the department [3] though appointed by himself [4] If it can be shown that the act complained of was substantially the act of the head himself he would be liable as an individual just as a stranger committing the same act would be.[5] The principle of employers liability does not apply to public officials so as to make them responsible for the acts of their subordinates The relation between a superior and a subordinate officer is not that of a master and servant but they are fellow servants of the Crown

If a person commits a wrongful act he cannot escape liability merely because he acted in obedience to the order of the executive Government or of any officer of State If the wrongful act had been committed by some subordinate officer of a Government Department or of the Crown by the order of a superior officer that superior officer could be sued

The acts of a Government officer bind the Government only when he is acting in the discharge of a certain duty within the limits of his authority or if he exceed that authority when the Government in fact or in law directly or by implication ratifies the excess [6] Where the act complained of is done by a Government official occupying such a position that for all practical purposes the Government has no control over him and the Government did not cause or authorize or adopt such act and gained no profit from it the Government is not liable [7] If a public officer exceeds his rights

[1] *Cullen* v *Thomson* (1862) 4 Macq H L 424 441

[2] *Bulkeley* v *Dunbar* (1792) Anstr 37

[3] *Raleigh* v *Goschen* [1898] 1 Ch 73 77 *Bainbridge* v *The Postmaster General* [1906] 1 K B 178 *Roper* v *Public Works Commissioners* [1915] 1 K B 45

[4] *Lane* v *Cotton* (1701) 12 Mod. 472 1 Ld Raym. 646 *Whitfield* v *Lord Le Despencer* (1778) 2 Cowp 754 *Mersey Docks Trustees* v *Gibbs* (1866) L R 1 H L 93 124

[5] *Raleigh* v *Goschen* sup

[6] *Collector of Masulipatam* v *Cavaly Vencata Narrainpah* (1861) 8 M I A 529 554 *Secretary of State for India* v *Sulemanji* (1902) 26 Bom 801 807 4 Bom L R. 706 *In re Vasudeo Harihar* (1920) 23 Bom. L R 161 188 *Secretary of State for India* v *Kasturi Reddi* (1902) 26 Mad 268 279

[7] *Moti Lal Ghose* v *Secretary of State* (1905) 9 C W N 495

and uses defamatory language or assaults a person he is responsible as any ordinary person.[1]

3 RIGHTS OF AGENTS AGAINST THIRD PERSONS

The remedies of agents against third persons in tort as a general rule are confined to cases where the right of possession is injuriously invaded or where they incur a personal responsibility or loss or damage in consequence of the tort[2] Where goods have been bailed and a third person wrongfully deprives the bailee of the use or possession of them or does them any injury the bailee is entitled to bring a suit for such deprivation or injury[3]

IV *Company and Director*

1 LIABILITY OF COMPANY

The ordinary principles of agency apply to companies which are consequently liable for the negligence of their servants and for torts committed by them in the course of their employment[4]

2 PERSONAL LIABILITY OF DIRECTOR

Directors are personally responsible for any torts which they themselves may commit or direct others to commit although it may be for the benefit of their company[5]

V *Firm and Partner*

Both under the English[6] and the Indian[7] law a firm is liable for torts committed by a partner in the ordinary course of the business of the firm Thus where a partner acting on behalf of the firm induced by bribery a clerk of the plaintiff a competitor in trade dishonestly and improperly and in breach of his duty to the plaintiff to communicate secret and confidential information in regard to the plaintiff s business whereby the plaintiff suffered loss it was held that the firm was liable for tort[8] Whether the act of a partner is one done in the course of the business of the firm is a question to be determined on the same considerations as those which determine the responsibility of a master for the acts of his servants

The relation of partners *inter se* is that of principal and agent and therefore each partner is liable for the acts of his fellows Every partner is liable to make compensation to third persons in respect of loss or damage

1 *Mumtaz Husain* v *Lewis* (1910) 7 A L J 301
2 Story on Agency 9th Edition p 485
3 Indian Contract Act IX of 1872 s 180
4 Lindley on Companies Vol I p 257
5 *Vide* Lindley Vol I p 348
6 Partnership Act (English) 1890 ss 10 and 12
7 The Indian Partnership Act (IX of 1932) s 26
8 *Hamlyn* v *Houston & Co* [1903] 1 K B 81

arising from the neglect or fraud of any partner in the management of the business of the firm [1]

VI *Guardian and Ward*

Guardians are not personally liable for torts committed by minors under their charge.[2] But guardians can sue for personal injuries to minors under their charge on their behalf [3]

(C) ABETMENT

In actions of wrong those who abet the tortious acts are equally liable with those who commit the wrong [4] A person who procures the act of another is legally responsible for its consequences (1) if he knowingly and for his own ends induces that other person to commit an actionable wrong or (2) when the act induced is within the right of the immediate actor and therefore not wrongful so far as the actor is concerned but is detrimental to a third party and the inducer procures his object by the use of illegal means directed against that third party [5]

[1] The Partnership Act 53 & 54 Vic, c 39 ss 10 11 and 12 The Indian Partnership Act (IX of 1932) s. 26

[2] *Luchmun Dass* v *Narayan* (1871) 3 N W P 191

[3] *Modhoo Soodhun* v *Kaemoolah* (1868) 9 W R 327

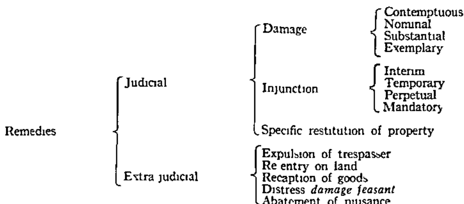
[4] *Kashee Nath* v *Deb Kristo* (1871) 16 W R 240 *Golab Chand* v *Jeebun* (1875) 24 W R 437 *Wharton* v *Moona Lall* (1866) 1 Agra 96

[5] *Allen* v *Flood* [1898] A C 1 96 *Nam Kee* v *Ah Fong* (1934) 13 Ran 175

CHAPTER IX

REMEDIES

THERE are two kinds of remedies for torts namely judicial and extra judicial Judicial remedies are remedies which are afforded by the act of law while extra judicial are those which are available to a party in certain cases of tort by his own acts alone



JUDICIAL REMEDIES

These remedies are (1) the awarding of damages (2) the granting of injunction and (3) the specific restitution of property Damages and injunction are merely two different forms of remedy against the same wrong and the facts which must be proved in order to entitle a plaintiff to the first of these remedies are equally necessary in the case of the second The third remedy is the specific restitution of property

1 *Damages*

Damages are the pecuniary satisfaction which a plaintiff may obtain by success in an action They are limited to the loss which a plaintiff has actually sustained and are designed not only as a satisfaction to the injured person but likewise as a punishment to the guilty to deter him from any such proceeding in the future The defendant is liable for any damage which is the direct consequence of his unlawful act whether he intended the consequence or not and whether he could have reasonably foreseen it or not [1]

[1] Such is the *ratio decidendi* of *Smith v London & South Western Ry Co* (1870) L R 6 C P 14 *Polemis and Furness Withy & Co In re* [1921] 3 K B 560 *Hambrook v Stokes Bros* [1925] 1 K B 141 *Great Western Ry Co v Mostyn (Owners of)* [1928] A C 57 91

The rule that a man is only liable for the natural and probable consequences of his act is not approved of in *Polemis* case[1] but is again referred to in *Haynes* v *Harwood*[2]

The presence or absence of reasonable anticipation of damage determines the legal quality of the act as negligent or innocent If it thus be determined to be negligent, then the question whether particular damages are recoverable depends only on the answer to the question whether they are the direct consequence of the act.[3] The fact that the damage caused is not the exact kind of damage one would expect is immaterial so long as the damage is in fact directly traceable to the negligent act and not due to the operation of independent causes having no connection with the negligent act except that they could not avoid its results[4]

This is however subject to the rule that cause and effect must not be too remote

Leading cases SCOTT v SHEPHERD POLEMIS CASE

Throwing of a lighted squib—In the first leading case the defendant determined to celebrate the happy deliverance of James I in the orthodox fashion and laid in a plentiful pyrotechnic supply with that intention He threw a lighted squib into the market house at a time when it was crowded with those that bought and sold. The fiery missile came down on the shed of a vendor of ginger bread who to protect himself caught it dexterously and threw it away from him It then fell on the shed of another ginger bread seller who passed it on in precisely the same way till at last it burst in the plaintiff s face and put his eye out It was held that the defendant must be presumed to have contemplated all the consequences of his wrongful act and was answerable for them[5]

Chasing with a pick axe—Where the defendant took up a pick axe and chased the plaintiff s servant boy who rushed for shelter into his master s shop and in so doing knocked out the faucet from a cask of wine whereby the wine ran out and was lost, it was held that the defendant was responsible in damages for the loss of the wine[6]

Wrongful placing of a truck in a road—The defendant s truck had contrary to local regulations been left on in the street for the night the shafts being shored up and projecting into the road a second truck was similarly placed on the opposite side of the road the driver of a third truck endavouring to drive past the narrowed way thus left struck the shafts of the defendant's truck which whirled round struck and injured the plaintiff who was on the side walk it was held that the defendant was liable[7]

Selling a diseased cow—Where the defendant knowing the plaintiff to be a farmer sold him a cow which he warranted free from disease and she was placed

[1] [1921] 3 K B 560 576 p 577

[2] See per Greer L J in [1935] 1 K B 153 156

[3] Per Banks, L J in *Polemis and Furnace Withy & Co In re* [1921] 3 K B 560 574

[4] Per Scrutton L J in *Ibid*

[5] *Scott* v *Shepherd* (1772) 2 W Bl 892

[6] *Vandenburgh* v *Truax* (1847) 4 Denio 464 N Y

[7] *Powell* v *Deveney* (1849) 3 Cush 300

with other cows some of which became infected and died the defendant was held liable for the entire loss as being a natural damage [1]

Leaving a loaded gun at full cock — The defendant left a loaded gun at full cock beside a gap from which a private path led over defendant's lands from the public road to his house The defendant's son (aged fifteen) coming towards his father's house along the path found the gun and returning with it to the public road not knowing it was loaded pointed it in play at the plaintiff who was injured by the gun going off It was held that the defendant was liable as the damage caused was not too remote [2]

Allowing ice to remain on a railway platform — At a railway station some water had frozen upon the platform The cause of this was unexplained but from the ice being nearly an inch thick and extending nearly half way across the platform it had the appearance of having been there some time A passenger while waiting for a train, not observing the ice stepped upon it and fell sustaining serious injury It was held that the defendants were guilty of actionable negligence in allowing the ice to remain on the platform [3]

Leaving unfenced a stream of water — A water company left unfenced a stream of water which they had caused to spout up in a public highway The horses of the plaintiff were frightened and swerving from it fell into an unfenced excavation in the highway made by contractors who were constructing a sewer and were thereby injured. It was held that the water company and not the contractors was liable as the proximate cause of the injury was the first negligent act which drove the carriage and horses into the excavation That act was the pouting up of the water by which the horses were frightened That was the *causa causans* of the mischief [4]

Injury to a mare owing to a gate left open — The plaintiff delivered to the defendant a mare to be agisted on his field which was separated by a wire fencing from his neighbour's field in the occupation of a cricket club Owing to the negligence of the defendant's servant in leaving open a gate between the two fields the mare strayed into the field occupied by the cricket club whereupon some of the members of the club endeavoured in a careful and proper manner to drive her back through the gate The mare refused to go through the gate and having run against the wire fence fell over it and was injured It was held that the injury to the mare was the natural consequence of the gate having been left open and that the defendant was liable [5]

Breach of duty of secrecy — The plaintiff who had lent money to a certain company being asked for a further advance employed the defendant a chartered accountant to look into the affairs of the company In a letter of instructions to the defendant the plaintiff inserted libellous statements concerning the former *manager and an auditor of the company The defendant handed the letter to* his partner who negligently left it at the company's office The manager found it read it, and communicated its contents to the two persons defamed who sued the plaintiff for libel and recovered damages against him the jury in each case

[1] *Smith* v *Green* (1875) 1 C P D 92 *Mullett* v *Mason* (1866) L R 1 C P 559 562 *Mowbray* v *Merryweather* [1895] 2 Q B 640

[2] *Sullivan* v *Creed* [1904] 2 I R 317

[3] *Shepherd* v *Midland Ry Co* (1872) 25 L T 879

[4] *Hill* v *New River Company* (1868) 9 B & S 303 305

[5] *Halestrap* v *Gregory* [1895] 1 Q B 561

finding that the writer of the letter was actuated by malice. The plaintiff then sued the defendant for breach of an implied duty to keep secret the letter of instructions It was held that it was the duty of the defendant to keep secret the contents of the letter that as he had neglected that duty the plaintiff could recover nominal damages only and no more that any further damages being in the nature of an indemnity for the consequences of the plaintiff s own wilful wrong could not be recovered[1]

Remoteness of damage —Law will permit no damages to be recovered excepting such as are the direct consequences of the tort *In jure non remota causa sed proxima spectatur* (in law the immediate or proximate not the remote cause of any event is regarded) Remoteness as a legal ground for the exclusion of damage in an action of tort means not severance in point of time but the absence of direct and natural causal sequence —the inability to trace in regard to the damage the *propter hoc* in a necessary or natural descent from the wrongful act[2] When it is said that the damage is too remote it means that the damage and the loss are no in Lord Campbell s phrase sufficiently concatenated as cause and effect The law cannot take account of everything that follows a wrongful act it regards some subsequent matters as outside the scope of its selection because it were infinite for the law to judge the cause of causes or consequences of consequences[3]

In the following cases damage will be considered too remote.

1 Where the defendant s act is not the direct cause of the damage sustained by the plaintiff Direct cause excludes what is indirect conveys the essential distinction which *causa causans* and *causa sine qua non* rather cumbrously indicate, and is consistent with the possibility of the concurrence of more direct causes than one operating at the same time and leading to a common result[4] Damage is recoverable if without intervening causes having no connection with the wrongful act it is directly traceable to the negligent act[5]

2 When the damage is caused wholly or principally by the act of the plaintiff himself it cannot be regarded as the necessary result of the defendant s misconduct[6] This is the rule in cases of contributory negligence

3 When the damage is the wrongful act of an independent third party such as could not naturally be contemplated as likely to spring from the defendant s conduct[7] The principle underlying the maxim *novus actus interveniens* (the intervention of human activity between defendant s act and its consequences) is that there are circumstances when an

[1] *Weld Blundell v Stephens* [1920] A. C 956

[2] *Dulieu v White & Sons* [1901] 2 K B 669 678

[3] Per Lord Wright in *Liesbosch Dredger v Edison* [1933] A C 449 460

[4] Per Bankes, L J in *Polemis and Furnace Withy & Co in re* [1921] 3 K B 560 570

[5] *Domine v Grimsdall* (1937) 106 L J K B 386 390

[6] See *Boyce v Bayliffe* (1807) 1 Camp 58 *Glover v L & S W Ry* (1867) L R 3 Q B 25

[7] *Vicars v Wilcocks* (1806) 8 East 1

intervening act of a third person who is not the defendant is in itself enough to break the chain of causation between the wrongful act and the damage or injury sustained by the plaintiff In general even though A is in fault he is not responsible for injury to C which B a stranger to him deliberately chooses to do Though A may have given the occasion for B's mischievous activity B then becomes a new and independent cause It is hard to steer clear of metaphors Perhaps one may be forgiven for saying that B snaps the chain of causation that he is no more conduit pipe through which consequences flow from A to C no mere moving part in a transmission gear set in motion by A that in a word he insulates A from C [1] But if what is relied upon as *novus actus interveniens* is the very kind of thing which is likely to happen if the want of care which is alleged takes place the principle embodied in the maxim is no defence. The whole question is whether or not to use the words of the leading case *Hadley v Baxendale* the accident can be said to be natural and probable result of the breach of duty Damage is recoverable if despite intervening independent causes the person guilty of the original wrongful act ought reasonably to have anticipated such interventions and to have foreseen that if they occurred the result would be that his wrongful act would lead to mischief [3] If the defendant by his conduct directly causes or compels a third person to do an act which produces damage to the plaintiff such damage is not too remote [4]

Where the *novus actus* is caused by an irresponsible actor it does not break the chain of causation [5] Children generally do not constitute *novus actus* where their action is the result of their mischievous propensities Any one who invites or gives an opportunity to mischievous children to do a dangerous thing cannot escape liability on the ground that he did not do the wrong [6]

In those cases in which accident is partly caused by the interference of a third person the defendant is not responsible unless it is found that his negligence is the effective cause of the accident [7]

4 Where there comes in the chain of causation the act of a person who is bound by law to decide a matter judicially and independently the consequences of his decision are too remote from the original wrong which gave him a chance of deciding Thus where a person has wrongfully taken a person into custody and brought him before a Magistrate he is not liable for the subsequent remand by the Magistrate which is a judicial act [8]

[1] Per Lord Sumner in *Weld Blundell v Stephens* [1920] A C 956 986

Per Greer L J in *Haynes v Harwood* [1935] 1 K B 146 156

[3] *Domine v Grimsdall* (1937) 105 L J K B 386 390

[4] *Scott v Shepherd* (1872) 2 W Bl 892

[5] *Weld Blundell v Stephens* [1920] A C 956 985

[6] Per Greer L J in *Haynes v Harwood* [1935] 1 K B 146 154

[7] *Mcdowall v Great Western Railway* [1903] 2 K B 331 337 *Clark v Chambers* (1878) 3 Q B D 327

[8] *Harnett v Bond* [1924] 2 K B 517 confirmed on appeal [1925] A C 669 *Chakrapani Naidu v Venkataraju* [1937] 1 M L J 611 45 L W 555

Leading case—POLEMIS CASE.

Destruction of a ship by petrol vapour—The defendants chartered the plaintiff's vessel to carry a cargo which included a quantity of benzine or petrol. Some of the petrol cases leaked on the voyage and there was petrol vapour in the hold. While shifting some cargo at a port the stevedores employed by the charterers negligently knocked a plank out of a temporary staging erected in the hold so that the plank fell into the hold and in its fall by striking something caused a spark which ignited the petrol vapour and the vessel was completely destroyed. It was held that as the fall of the board was due to the negligence of the charterer's servants, the charterers were liable for all the direct consequences of the negligent act even though those consequences could not reasonably have been anticipated and they were liable for the loss of the ship[1]. This case overrules *Sharp* v. *Powell*[2] in which the defendant's servant in breach of a Police Act washed the defendants' van in a street and allowed the waste water to run down the gutter towards a grating leading to the sewer about twenty five yards off. In consequence of the extreme severity of the weather the grating was obstructed by ice and the water flowed over a portion of the causeway which was ill paved and uneven and there froze. The plaintiff's horse while being led past the spot slipped upon the ice and broke its leg. It was held that this was a consequence too remote to be attributed to the wrongful act of the defendant.

Loss of articles—*Race glasses*—The plaintiff was travelling with other passengers in a railway carriage, and on the tickets being collected there was found to be a ticket short. The plaintiff was charged by the ticket collector with being the defaulter and on his refusing to pay the fare or leave the carriage, he was removed from the carriage by the company's officers without any unnecessary violence. It turned out that the plaintiff had a ticket and he had left a pair of race glasses when removed. It was held that he could not recover for its loss as it was not the necessary consequence of the defendants' acts[3].

Currency notes—The deceased's death was caused by a collision between the train in which he was travelling and another train of the same railway administration. In an action under Act XIII of 1855 for the pecuniary loss which resulted to members of the deceased's family from his death a claim was included for Rs 1,300 being the value of lost currency notes which the deceased was carrying with him on the night in question. It was held that the defendant railway would not be liable for loss resulting from the wrongful act (e.g. theft) of the third party such as could not naturally be contemplated as likely to spring from the defendant's conduct.[4]

Putting up a barrier in a street—The defendant was in occupation of certain premises abutting on a private road which he used for athletic sports. He erected a barrier across the road to prevent persons driving vehicles up to the

[1] *Polemis and Furnace Withy & Co in re* [1921] 3 K B 560 over ruling *Greenland* v *Chaplin* (1850) 5 Ex 243.

[2] (1872) L R 7 C P 253.

[3] *Glover* v *L & S W Ry* (1867) L R 3 Q B 25.

The negligence of a railway company caused such an injury to a passenger that he became insane and by reason of the insanity he committed suicide; the injury was not regarded as the proximate cause of the death and the company was held not liable for his death. *Scheffer* v *W & C Ry* L 7 Aug 1882.

[4] *Secretary of State* v *Gokal Chand* (1925) 6 Lah 451.

ence surrounding his premises and overlooking the sports In the middle of his barrier was a gap which was usually open for vehicles but which was closed when sports were going on The defendant had no legal right to erect this barrier Some person removed a part of the barrier armed with spikes from the carriage way and put it in an upright position across the footpath The plaintiff on a dark night, was proceeding along the way when his eye came in contact with one of the spikes and was injured It was held that the defendant was liable having unlawfully placed a dangerous instrument in the road notwithstanding the fact that the immediate cause of the accident was the intervening act of a third party in removing the dangerous instrument from the carriage way to the footpath [1]

A derelict vessel—A vessel met with certain risks and injuries which compelled her crew to leave her and she became a derelict She was driven ashore by a violent storm and after having been abandoned was forced by wind and waves against a pier whereby serious damage was occasioned It was held that the owners of the ship were not liable The Court said The ship should be dealt with as if it had been abandoned at the antipodes and had been ploughing the ocean without a crew for years before it was driven against the pier [2]

Illness due to travelling in a wrong train—The plaintiff took tickets at W for himself wife and children to go to H by the last train at night By the negligence of the porters they were put into the wrong train and carried to E Being unable to obtain accommodation for the night at E or a conveyance they walked home a distance of four miles and the night being wet the wife caught cold and medical expenses were incurred It was held that the husband was entitled to recover damages in respect of inconvenience suffered by being compelled to walk home but that the illness of the wife was a consequence too remote from the breach of contract for damages to be recoverable for it [3]

Damage due to robbery in a train—The plaintiff alleged that he had suffered damage through being robbed while a passenger on the defendants railway and that through the refusal of the defendants servants to stop the train and afford him facilities for arresting the persons who had robbed him he was prevented from recovering the property stolen He also claimed to recover the amount of the money stolen from him as damages for the negligent over crowding of the carriages It was held that the damage claimed was too remote [4]

Fowls running foul of a cycle—The plaintiff was riding a bicycle on a highway upon the footpath of which were some fowls belonging to the defendant As the plaintiff got abreast of the fowls a dog belonging to a third person frightened the fowls one of which flew into the spokes of the machine causing it to upset whereby the plaintiff suffered personal injury and the bicycle was damaged It was held that even if the fowl was not lawfully on the highway the circumstances under which the accident happened prevented the damage from being the natural consequence of its presence there and that the plaintiff could not recover [5]

[1] *Clark* v *Chambers* (1878) 3 Q B D 327

[2] *River Wear Comrs* v *Adamson* (1877) 2 App Cas 743

[3] *Hobbs* v *L & S W Ry* (1875) L R 10 Q B 116

[4] *Cobb* v *G W Ry* [1893] 1 Q B 459

[5] *Hadwell* v *Righton* [1907] 2 K B 345 See *Heaths Garage Ltd* v *Hodges* [1916] 1 K B 206

Death caused by the kicking of a horse —A workman was killed in the course of his employment by the kick of a horse belonging to a third party by whose servant it was brought upon the employer s premises and left there unattended It was held that in the ordinary course of things a horse not known to be vicious would not kick a man and that the injury to the deceased was not sufficiently connected with the trespass or negligence to be the natural or probable consequence of it [1]

Indian cases —Uncertain voluntary payment —Where the plaintiffs sued for possession of certain idols and prayed for damages on the ground that they had been prevented from receiving certain sum which they might have received if they had custody of the idols, it was held that no suit would lie as the damages were based upon uncertain and merely voluntary payment.[2]

Loss of crops —Where loss of rents resulted to a landlord from his ryots crops being injured and destroyed owing to a neighbouring landlord s stopping the outlets by which surface drainage water had from time immemorial flowed from the plaintiff s land it was held that this was not too remote a damage [3]

Death of a cow during lawful d tention —The defendants seized the plaintiff s cow on the ground that it had trespassed the previous day into their cotton plantation and refused to give it up The cow while it was in their custody suddenly died The plaintiff sued for the value of the cow It was held that the death of the cow was not a natural or probable result of the seizure and detention and the defendants therefore were not liable [4]

Damage not the probable result of defendant s act —A dispute having arisen regarding the possession of certain land an order was passed under s 131 of the Criminal Procedure Code 1872 forbidding both the plaintiff and the defendant to interfere with the land until either establi hed his title in a civil Court The land in consequence of this order was not cultivated in the following year The plaintiff sued for damages for the loss of profits resulting from non cultivation of the land It was held that the damages were not the probable result of the defendant s act but were the consequence of a judicial act proceeding from the Magistrate alone [5]

Loss of commission —The plaintiff ued the Secretary of State for India for damages in respect of two orders of the District Magistrate of Ganjam suspending and dismissing one T the local agent of the Assam Labour Supply

1 *Bradely* v *Wallaces Ltd* [1913] 3 K B 629

2 *Rameshur Mookerjee* v *Ishan Chunder Mookerjee* (1868) 10 W R 457 A suit for *wasilat* in respect of profits derived from a turn of worship which are in their nature uncertain and voluntary is not maintainable *Kashi Chandra* v *Kailash Chandra* (1899) 26 Cal 356 *Dino Nath* v *Pratap Chandra* (1899) 27 Cal 30 See also *Venkatasa* v *T Srinivasa* (1869) 4 M H C 410 *Ram Gobind* v *Magistrate of Ghazeepoor* (1872) 4 N W P 146

3 *Mussamut Anundmoyee Dossee* v *Mussamut Hameedoonissa* (1862) 1 Marsh 85 *Punnun Sing* v *Meher Ali* (1864) W R (Gap No) 365 *Ram Chandra Jana* v *Jiban Chandra Jana* (1868) 1 Beng L R (A C J) 203 The plaintiff cannot recover the value of the crops he is prevented from raising on his land by reason of the defendant obstructing his right of way to his land *Karibasavana Goud* v *Veerabhadrappa* (1912) 36 Mad 580

4 *Mi Taw* v *Nga Ket* (1904) U B R (1904 1906) Tort p 1

5 *Ammani Ammal* v *Sellayi Ammal* (1893) 6 Mad 436

Association represented by the plaintiff The Magistrate had ordered the recruiting depot to be closed and the plaintiff was thereby prevented from earning from the members of the Association his commission of seven rupees for each labourer sent to Assam It was held that though the District Magistrate had power to dismiss the local agent but not to suspend him or to close his depot to recruiting under the Assam Labour and Emigration Act yet the *damage to the plaintiff by reason of the loss of his commission was too remote*[1]

Measure of damages

The expression measure of damages means the scale or rule by reference to which the amount of damages to be recovered is in any given case to be assessed Damages may rise to almost any amount or they may dwindle down to being merely nominal The law has not laid down what shall be the measure of damages in actions of tort the measure is vague and uncertain depending upon a vast variety of causes facts and circumstances In cases of criminal conversation battery imprisonment slander malicious prosecution etc the state degree quality trade or profession of the party injured as well as of the person who did the injury must be and generally are considered by a jury in giving damages[2] The common law says that the damages due either for breach of contract or for tort are damages which so far as money can compensate will give the injured party reparation for the wrongful act If there be any special damage which is attributable to the wrongful act that special damage must be averred and proved [3] At common law no damages can be recovered for the death of a human being[4]

If damage has resulted from two or three causes as from an act of *God as well as a negligent act of a party then the award of damages should* be apportioned to compensate only the injury caused by the negligent act[5] When two or more persons are sued together as joint tort feasors there can be only one decree against them The measure of damages is the aggregate injury caused to the plaintiff by the joint act of defendants The damages cannot be apportioned so as to award one sum against one defendant and another against other defendants though they may have been guilty in unequal degree[6]

Where a wrong has been committed the wrong doer must suffer from the impossibility of accurately ascertaining the amount of damages[7] But

1 *Ross* v *Secretary of State for India* (1913) 37 Mad 55 See *Robert* v *Issac* (1870) 6 Beng L R App 20 where interest on bills was claimed

2 *Huckle* v *Money* (1763) 2 Wilson 205 206

3 Per Lord Dunedin in *Admiralty Commissioners* v *S S Susquehanna* [1926] A C 661 662

4 *Baker* v *Bolton* (1808) 1 Camp 493 *Osborne* v *Gillet* (1873) L R 8 Ex 88

5 *Nitro Phosphate etc Co* v *London and St Katherine Docks Co* (1878) 9 Ch D 503

6 *Clark* v *Newsam* (1847) 1 Ex 131 *London Association for Protection of Trade* v *Greenlands Ltd* [1916] 2 A C 15 *Greenlands Limited* v *Wilmshurst etc* [1913] 3 K B 507

7 *Duke of Leeds* v *Earl of Amherst* (1850) 20 Beav 239

the plaintiff must give the best evidence to prove damages[1]

In consequence of a railway embankment the flood waters of a river were pent back and flowed over the land of the plaintiff doing some injury had the embankment not been constructed the waters would have flowed a different way but would have reached the plaintiff s land, and would have done damage to a lesser amount. It was held that the measure of damages recoverable by the plaintiff against the railway company was the difference only between the two amounts[2]

There are four kinds of damages (1) contemptuous, (2) nominal (3) substantial or ordinary and (4) exemplary or vindictive or retributory or punitive.

(1) Contemptuous damages are awarded when it is considered that an action should never have been brought

(2) Nominal damages are awarded where the purpose of the action is merely to establish a right no substantial harm or loss having been suffered for example in cases of infringements of absolute rights of personal security (e g assault) and property (e g bare trespass invasion of a right of easement etc.) Nominal damages are so called because they bear no relation even to the cost and trouble of suing and the sum awarded is so small that it may be said to have no existence in point of quantity, e g one anna one shilling But nominal damages are not necessarily small damages[3]

(3) Substantial or ordinary damages are awarded where it is necessary to fairly compensate the plaintiff for the injury he has in fact sustained These are also called compensatory damages Whatever sum is awarded whether large or small must afford a fair measure of compensation to the plaintiff with reference to the actual harm sustained by him The law does not aim at restitution but compensation and the true test is what sum would afford under the circumstances of each particular case a fair and reasonable compensation to the party wronged for the injury done him the plaintiff's own estimate being regarded as the maximum limit

(4) Exemplary, or vindictive or retributory, or punitive damages are awarded wherever the wrong or injury is of a grievous nature done with a high hand or is accompanied with a deliberate intention to injure or with words of contumely and abuse[4] Such damages are also to use an Americanism called smart money It may happen that a wrong is done to a man which is not only an injury in the ordinary sense, but is in itself of so grave and reprehensible a character or is done under such circumstances as to aggravate the injury and import insult or outrage that

[1] *Joseph v Sheu Bux* (1918) 21 Bom L R 615 113 116 *Bishun Singh v Wyatt* (1911) 14 C L J 515

[2] *Workman v G N Ry Co* (1863) 32 L J Q B 279

[3] *Mediana v Comet* [1900] A C.

[4] *Bell v Midland Ry* (1861) 10 C B N S 287 308 *Emblem v Myers* (1860) 6 H & N 54

it is next to impossible to measure damages by any strict numerical rule e.g gross defamation seduction of a man s daughter with deliberate fraud, a wanton trespass of land persisted in with violent and intemperate behaviour assault and false imprisonment under colour of a pretended righ malicious prosecution The damages assessed depend on the circumstance showing the degree of moral turpitude or atrocity of the defendant s conduct

Such damages operate as a punishment for the benefit of the community and as a restraint to the transgressor

General and special damages

General damages are such as the law will presume to be the natural or probable consequences of the defendant s acts They need not be proved by evidence for they arise by inference of law even though no actual pecuniary loss has been or can be shown General damages are such as the jury may give when the Judge cannot point out any measure by which they are to be assessed except the opinion and judgment of a reasonable man [1] Whenever the defendant violates any absolute legal right of the plaintiff general damage to at least a nominal amount will be implied

The expression special damage has three different meanings—

(1) It is employed to denote that damage arising out of the special circumstances of the case which if properly pleaded may be super added to the general damage which the law implies in every infringement of an absolute right

(2) Where no actual and positive right (apart from the damage done) has been di turbed it is the damage done that is the wrong and the expression special damage when used of this damage denotes the actual and temporal loss which has in fact occurred Such damage is called variously express loss particular damage damage in fact special or particular cause of loss

(3) In actions brought for a public nuisance such a the obstruction of a river or a highway special damage denotes that actual and particular loss which the plaintiff must allege and prove that he has sustained beyond what is sustained by the general public if his action is to be up ported such particular loss being as is obvious the cause of action [3]

Where special damage is the gi t of the plaintiff s case and he fails to prove such damage he is precluded from recovering ordinary damages [4] But where special damage is not the gist of the case he is not precluded from recovering ordinary damages by reason of his failing to prove the special damage [5]

[1] *Prehn v Royal Bank of Liverpool* (1870) L R 5 Ex 92 99
Ashby v White (1704) 2 Ld Raym 938

[3] *Ratcliffe v Evans* [1892] 2 Q B 524 528 followed in *Manjappa Chettiar v Ganapathi Gounden* (1911) 21 M L J 1052

[4] *Wilson v Kanhya* (1869) 11 W R 143

[5] *Mudlun Mohun Doss v Gokul Doss* (1866) 10 M I A 563

of action against A D who was present and heard it also refuses to make such a contract surely another action will lie

Damages for mental and nervous shock

By mental shock is meant a shock to the moral or intellectual sense by nervous shock a shock to the nerve and brain structures of the body

No action will lie for mental suffering unattended by physical injury Mental pain or anxiety the law cannot value and does not pretend to redress when the unlawful act complained of causes that alone though where a material damage occurs and is connected with it it is impossibl a jury in estimating it should altogether overlook the feelings of the party interested [1] For example in a case of defamation the Court in assessing damages could not avoid taking into consideration the injured feelings of the plaintiff though if the plaintiff failed to prove publication to a third party, no matter how deeply his feelings might be wounded at the words used to him by the defendant he would have no remedy by way of damages However keen and painful an emotion of the mind may be it can only be measured and proved by physical effects Thus where a servant is wrongfully dismissed from his employment the damages for dismissal cannot include compensation for the manner of the dismissal for his injured feelings [2] The case of assault forms an exception to this for the essence of the wrong consists in putting a man in present fear of violence In estimating damages for malicious prosecution a Court may take into consideration the plaintiff s feelings [3]

As regards damage arising from nervous shock the Privy Council ruled that such damage was too remote to fix a defendant with liability [4] But this case is severely criticised as laying down bad law In their Lordships judgment the difference between a nervous shock and a mental shock is overlooked and the decision is therefore open to question [5] The Irish Court of Appeal has dissented from it [6] and in recent cases it has not been followed even in England In *Dulieu* v *White & Sons* [7] it has been clearly laid down that damages which result from a nervous shock occasioned by fright unaccompanied by any actual impact may be recoverable in an action for negligence if physical injury has been caused to the plaintiff This case is now accepted as good law [8] The cause of action

[1] Per Lord Westbury in *Lynch* v *Knight* (1861) 9 H L C 577 598

[2] *Addis* v *Gramophone Co Ltd* [1909] A. C 488 See *Manubens* v *Leon* [1919] 1 K B 208 and *Lindsay* v *Queen s Hotel Co Ltd* [1919] 1 K B 212 as to measure of damages in cases of wrongful dismissal

[3] *Huro Lall* v *Huro Chunder* (1869) 12 W R. 89 *Rai Jung Bahadur* v *Rai Gudor Sahoy* (1897) 1 C W N 537

[4] *Victorian Rys Commis* v *Coultas* (1888) 13 App Cas. 222

[5] See *Pugh* v *L B & S Ry* [1896] 2 Q B 248

[6] *Bell* v *G N Ry* (1890) 26 L. R. Ir 428

[7] [1901] 2 K B 669 *Wilkinson* v *Dounton* [1897] 2 Q B 57

[8] *Hambrook* v *Stokes Bros* [1924] 1 K B 141 The dictum of Kennedy J in *Dulieu s* case that the shock where it operates through the

appears to be created by breach of the ordinary duty to take reasonable care to avoid inflicting personal injuries followed by damage even though the type of damage may be unexpected—namely shock.[1] False words and threats calculated to cause, uttered with the knowledge that they are likely to cause and actually causing physical injury to the person to whom they are uttered are actionable.[2]

Shock caused by apprehension of injury.—Where the gate keeper of a railway company had negligently invited the plaintiffs, a husband and wife, to drive over a level crossing when it was dangerous to do so and their buggy was nearly but not quite run down by a passing train and the wife fainted and received a severe nervous shock from the fright in consequence of which she suffered a severe illness, it was held that the damage was too remote to be recovered.[3] As stated above this case has not been followed in subsequent cases. The plaintiff who was in the family way was behind the bar of her husband's public-house and the defendants by their servants negligently drove a pair horse van into the public house. The plaintiff in consequence sustained a severe shock and became seriously ill and gave premature birth to a child who in consequence of the shock sustained by the plaintiff was born an idiot. It was held that the defendant was liable and the damages sought to be recovered were not too remote.[4] The defendants' servant left a motor lorry at the top of a steep street unattended with the engine running. The lorry started off by itself and ran violently down the incline. The plaintiff's wife who had been walking up the street with her children had just parted with them a little below a point where the street made a bend when she saw the lorry rushing round the bend towards her. She became very frightened for the safety of her children who by that time were out of sight round the bend. She was immediately informed by bystanders that a child answering the description of one of hers had been injured. In consequence of her fright and anxiety she suffered a nervous shock which eventually caused her death. In an action by the husband under the Fatal Accidents Act it was held that on the assumption that the shock was caused by what the woman saw with her own eyes as distinguished from what she was told by bystanders the plaintiff was entitled to recover notwithstanding that the shock was brought about by fear for her children's safety and not by fear for her own.[5]

Shock caused by false news.—The defendant by way of a practical joke falsely represented to the plaintiff that her husband had met with a serious accident whereby both his legs were broken. By reason of this misrepresentation the plaintiff suffered a violent nervous shock and was made seriously ill, and her hair was turned white and her life was for some time in great danger and her husband had to incur expenses for medical treatment for her. It was

mind must be a shock which arises from a reasonable fear of immediate personal injury to oneself is not accepted as good law applicable in every case, per Bankes L. J. at pp. 150-151; Atkin L. J. at p. 157; *Coyle* v. *Watson* [1915] A. C. 13.

[1] Per Atkin L. J. in *Hambrook* v. *Stokes Bros.* [1925] 1 K. B. 141, 158.

[2] *Janvier* v. *Sweeney* [1919] 2 K. B. 316.

[3] *Victorian Railways Commissioners* v. *Coultas* (1888) 13 App. Cas. 222.

[4] *Dulieu* v. *White and Sons* [1901] 2 K. B. 669.

[5] *Hambrook* v. *Stokes Bros.* [1925] 1 K. B. 141.

held that the defendant was liable.[1]

Shock caused by threats.—The defendants were two private detectives One of them was designing to inspect certain letters, to which he believed the plaintiff a maid servant had means of access. He instructed the other defendant, who was his assistant to induce the plaintiff to show him the letters telling him that the plaintiff would be remunerated for this service The assistant endeavoured to persuade the plaintiff by false statements and threats as the result of which the plaintiff fell ill from a nervous shock. In an action by the plaintiff against the defendants for damages, it was held that the assistant was acting within the scope of his employment and that both the defendants were liable

Insurance

A recovery upon a contract with the insurers is no bar to a claim for damages against the wrong doer[3] In an action for injuries caused by the defendant's negligence a sum received by the plaintiff on an accidental insurance policy cannot be taken into account in reduction of damages[4] Where the plaintiff sued the defendants for damaging his ship by collision it was held that the defendants were not entitled to deduct from the amount of damages to be paid by them a sum of money paid to the plaintiff by insurers in respect of such damage.[5] Otherwise the wrong-doer pays nothing and takes all the benefit of a policy of insurance without paying the premium. But where the assured who has been indemnified for a wrong recovers from the wrong doer the insurers may recover the amount from the assured[6] The insurer has also the clearest equity to use the name of the assured in order to reimburse himself by suing the wrong-doer[7]

Aggravation and mitigation of damages

As damages may be aggravated by the defendant's ill behaviour or motives so they may be reduced by proof of provocation or of his having acted in good faith

Damages in actions of contract and of tort

The measure of damages or test by which the amount of damages

[1] *Wilkinson* v *Downton* [1897] 2 Q B 57

[2] *Janvier* v *Sweeney* [1919] 2 K. B 316

[3] *Mason* v *Sainsbury* (1782) 3 Dougl 61

[4] *Bradburn* v *G W Ry* (1874) L R. 10 Ex. 1 If the plaintiff is the widow of a deceased and her husband has made provision for her by a policy on his own life in her favour the amount of such policy is not to be deducted from the amount of damages previously assured irrespective of such consideration She is benefited only by the accelerated receipt of the amount of the policy and that benefit being represented by the interest of the money during the period of acceleration may be compensated by deducting future premia from the estimated future earning of the deceased *Grand Trunk Ry Co of Canada* v *Jennings* (1888) 13 App. Cas. 800

[5] *Yates* v *White* (1838) 4 Bing N C. 272

[6] *Ibid* p 283

[7] *Randal* v *Cockran* (1748) 1 Ves Sen 98 *Simpson* v *Thomson* (1877) 3 App Cas. 279

is to be ascertained is in general the same both in contract and in tort with these distinctions —

(1) The intention with which a contract is broken is perfectly immaterial whereas the intention with which a tort is committed may fairly be regarded by the Court in assessing the amount of damages In actions of contract evidence of malicious motive is not admissible in those of tort it is Thus in an action for throwing poisoned barley upon the plaintiff's premises in order to poison his poultry the Court took into account the malicious intention of the defendant in awarding damages[1]

(2) In cases of contract damages are only a compensation of tort to the property they are generally the same Injuries to property are only visited with damages proportioned to the actual pecuniary loss sustained where damage pecuniary or estimable in money is the gist of action But where absolute rights are infringed a plaintiff is awarded nominal damages not because he has lost anything but because his rights are absolute Where the injury is to the person or feelings and the facts disclose fraud malice violence cruelty or insult it is difficult to fix a limit and damages awarded in such cases are exemplary They bear no proportion to the actual loss sustained by the plaintiff Here the principle is not compensation to the plaintiff or recognition of the superiority of his rights but the turpitude of the defendant the expression or manifestation of disapprobation of the defendant s conduct and of a desire to prevent its repetition But exemplary damages cannot be recovered for a breach of contract except in an action for breach of promise of marriage

(3) The condition of the defendant and his being a man of substance are also proper circumstances of aggravation in cases of torts but not of breaches of contracts

(4) The principle with regard to the remoteness of damage is not the same in actions of contract and of tort In tort damages are given for consequences of which the defendant had no notice[2] In the case of a breach of contract the second rule in *Hadley* v *Baxendale*[3] may apply

(5) In a contract it is the duty of the plaintiff as a prudent man to take measures to reduce the damages as far as possible for a breach of contract consists in the defendant s failure to do a certain act that he is bound to do and it would be quite open to the plaintiff to take other measures to obtain the result he expected from the defendant s performance a tort on the other hand may consist in the defendant s failing to do an act which he is bound to do or in doing one which he ought not to do or in preventing the plaintiff from doing an act which he is entitled to do[4]

[1] *Sears* v *Lyons* (1818) 2 Stark 317

The Arpad [1934] P 189 202 237

[3] (1854) 9 Ex. 341

[4] *Karibasavana Goud* v *Veerabhadrappa* (1912) 36 Mad 580

2 *Injunction*

An injunction is an order of a Court restraining the commission repetition or continuance of a wrongful act of the defendant To entitle a party to an injunction he must prove either damage or apprehended damage The apprehended damage must involve imminent danger of a substantial kind or injury that will be irreparable[1]

An injunction may be granted to prevent waste or trespass or the continuance of nuisance to dwelling or business houses to right of support to right of way to highways to ferries to markets etc or the infringement of patent rights copyrights and trademarks or the publication of trade secrets or the wrongful sale or detention of a chattel or the publication of a libel or the uttering of a slander or the disclosure of confidential communications papers secrets etc or the publication of manuscripts letters and other unpublished matter

The right to an injunction is governed in India by the Specific Relief Act

3 *Specific restitution*

The third kind of remedy is the specific restitution of property Thus a person who is wrongfully dispossessed of immovable property[3] or of specific movable property[4] is entitled to recover the immovable or movable property as the case may be

EXTRA JUDICIAL REMEDIES

The remedies falling in this class will be found treated of in their proper places Of these the remedy of abatement is now in use only as to right of common,[5] right of way and sometimes right of water and even in those cases it ought never to be used without good advisement

JOINT TORT FEASORS

All persons who aid or counsel or direct or join in the committal of a wrongful act are joint tort feasors[6] Persons are not joint tort feasors merely because their independent wrongful acts have resulted in one damnum[7] To constitute a joint liability the act complained of must be joint and not separate.[8] The joint liability arises under three circumstances —

[1] *Mahadev* v *Narayan* (1904) 6 Bom L R 123
See ss 53 54 55 and 56 of the Specific Relief Act (I of 1877) as regards the granting or withholding of injunction

[3] Specific Relief Act (I of 1877) s. 9

[4] Specific Relief Act (I of 1877) s. 10

[5] *Hope* v *Osborne* [1913] 2 Ch 319

[6] *Petrie* v *Lament* (1841) Car & Mar 93 96 A lessor does not become jointly liable with his lessee for the latter's tort simply by reason of his being the lessor or by any encouragement of the lessee in the absence of evidence that he had made himself a party to the tort *Pugh* v *Ashutosh Sen* (1928) 56 I A 93 s c 31 Bom L R. 702

[7] *The Koursk* [1924] P 140

[8] *Thompson* v *London County Council* [1899] 1 Q B 810 *Sadler* v *G W Ry* [1896] A C 450 *Nilmadhub* v *Dookeeram* (1874) 15 Beng L R. 161

(1) Agency when one person employs another to do an act which turns out to be a tort.

(2) Vicarious liability i e the liability arising from relations such as master and servant principal and agent guardian and ward etc which are discussed in Chapter VIII

(3) Joint action Where two or more persons combine together to commit an act which amounts to a tort. If independent acts of several persons cause the same damage they are not joint tort feasors and could not be joined as defendants [1]

In connection with the liability for a joint act the following principles should be observed —

1 Joint tort feasors are jointly and severally liable for the whole damage resulting from the tort They may be sued jointly or severally If sued jointly the damages may be levied from all or either [2] Each is responsible for the injury sustained by their common act [3] In assessing damages against joint tort feasors one set of damages will be fixed and they must be assessed according to the aggregate amount of the injury resulting from the common act [4] If two omnibuses are racing and one of them runs over a man who is crossing the road and has not time to get out of the way the injured person has a remedy against the proprietor of either omnibus

Those who are sued cannot insist on having the others joined as defendants The mere omission to sue some of them will not disable the plaintiff from claiming full relief against those who are sued [6] The fact that the claim is barred by limitation as against one will not in itself free the others from liability [7]

Two dogs belonging to different owners, acting in concert attacked a flock of sheep and injured several In an action for damages brought against the owners of the dogs, one of them put in a defence claiming that he was liable for one half only of the damage It was held that in law each of the dogs occa

[1] The mere coincidence of a number of persons doing a series of acts where by the plaintiff is injured will not make them joint tort feasors. It must be shown that they acted concurrently *Subbayya* v *Verayya* [1935] M W N 1013 42 L W 17

[2] *Hume* v *Oldacre* (1816) 1 Stark 351 *Blair* v *Deakin* (1887) 57 L T 522 *Sutton* v *Clarke* (1815) 6 Taunt 29 See *Kamala Prasad Sukul* v *Kishori Mohan Pramanik* (1927) 48 C L J 350

[3] *De Bodereugam* v *Le Arcedekne* (1302) Y B 30 Edw I fo 106 *Ajoodhya* v *Lalljee* (1873) 19 W R 218 *Shama Sunkur* v *Sreenath* (1869) 12 W R 354 *Harihar Pershad* v *Bholi Pershad* (1907) 6 C L J 383 Coercion is no defence *Ganesh Singh* v *Ram Raja* (1869) 3 Beng L R (P C) 44 *Biresshar Dutt Chowdhury* v *Baroda Prosad Ray* (1906) 15 C W N 825 *Gajo Singh* v *Amrit Narain* (1921) 2 P L T 234

[4] *Chapman* v *Lord Ellesmere* [1932] 2 K B 431

[5] Per Creswell J in *Thorogood* v *Bryan* (1849) 8 C B 115 121 *Clark* v *Neusam* (1847) 1 Ex 131

[6] *Subbayya* v *Verayya* sup

[7] *Harihar Pershad* v *Bholi Pershad* sup

sioned the whole of the damage as the result of the two dogs acting together and that consequently each owner was responsible for the whole.[1]

2 A judgment against one or more of several tort feasors is a bar to any further action against the others even though the judgment remains unsatisfied The reason is there is only one cause of action in such a case and it cannot be split up Otherwise a vexatious multiplicity of actions would be encouraged

3 A release granted to one or more of the several tort feasors operates as a discharge of the others The reason being that the cause of action which is one and indivisible having been released all persons otherwise liable thereto are consequently released[3] But a mere agreement not to sue one of them is no bar to an action against others[4] Because such an agreement merely prevents the cause of action from being enforced against the particular wrong doer with whom it is entered into The acceptance of a sum of money from one of the joint tort feasors in full discharge of his own personal liability does not operate as a release as far as the other joint tort feasors are concerned[5]

Under the Law Reform (Married Women and Tort feasors) Act 1935[6] when judgment is recovered against any tort feasor it shall not be a bar to an action against any other person who would if sued have been liable as a joint tort feasor[7] If more than one action is brought in respect of that damage against tort feasors (whether as joint tort feasors or otherwise) the sums recoverable by way of damages shall not in the aggregate exceed the amount of the damages awarded by the judgment first given and except in the case in which the judgment is first given the plaintiff shall not be entitled to costs unless the Court thinks there was reasonable ground for the action[8]

CONTRIBUTION BETWEEN WRONG DOERS

At common law no action for contribution was maintainable by one wrong doer against another although the one who sought contribution

[1] *Arneil v Paterson* [1931] A C 560

[2] *Brinsmead v Harrison* (1872) L R 7 C P 547 but a fresh assignment in respect of a tort subsequent to that originally sued upon will not come within the scope of the first judgment so as to bar the fresh assignment. Per Willes J in *ibid* (1871) L R 6 C P 584 followed in *Govind Baba Gujar v Jijibai* (1911) 14 Bom. L R 9 See *Ash v Hutchinson & Co (Publishers)* [1936] 1 Ch. 489

[3] *Duck v Mayeu* [1892] 2 Q B 511 513 *Thurman v Wild* (1840) 11 A. & E 453 *Basharat Beg v Hiralal* [1932] A L J 497

[4] *Duck v Mayeu sup* *Rice v Reed* [1900] 1 Q B 54 *Hutton v Eyre* (1815) 6 Taunt 289 See to the same effect *Ram Kumar Singh v Ali Husain* (1909) 31 All 173 *Kamala Prasad Sukul v Kishori Mohan Pramanik* (1927) 48 C L J 350 *Pollachi Town Bank Ltd v Subramania Ayyar* (1933) 39 L W 114

[5] *Cocke v Jennor* (1615) Hob 66 See to the same effect *Kamala Prasad Sukul v Kishori Mohan Pramanik sup*

[6] 25 & 26 Geo V c 30

[7] *Ibid* s 6 (1) (*a*)

[8] *Ibid* s. 6 (1) (*b*)

might have been compelled to satisfy the full damages[1] This principle was confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act that is it extended only to cases of wilful and conscious wrong doing The reason alleged for this rule was that any such claim to contribution must be based on an implied contract between the tort feasors and that such a contract was illegal as being made with a view to commit an illegal act The community of wrong between joint tort feasors was the foundation of the action, but the same community of wrong precluded the defendant from recovering what he had paid in consequence of the illegal act[3]

The principle of *Merryweather* v *Nixan* does not extend—

(1) To cases of negligence[4] accident mistake or other unintentional breaches of the law

(2) To cases of indemnity where one man employs another to do acts not unlawful in themselves for the purpose of asserting a right[5]

(3) Where one party induces another to do an act which is not *legally supportable and yet is not clearly in itself a breach of law* the party so inducing shall be answerable to the other for the consequences[6]

(4) To admiralty actions in cases of collision In such actions the damage caused to a vessel by the collision of another vessel is borne equally by the two vessels[7]

(5) To the right of contribution between directors or promoters who are jointly and severally liable for misrepresentations contained in a prospectus[8]

The principle of *Merryweather* v *Nixan* has been followed in several cases in India[9] though its applicability is doubted in various

[1] *Merryweather* v *Nixan* (1799) 8 T R 186 *Sreeput Roy* v *Loharam Roy* (1867) 7 W R 384 F B *Parbhu Dayal* v *Dwarka Prasad* (1932) 54 All 371

[2] *Adamson* v *Jarvis* (1827) 4 Bing 66 73 *Palmer* v *Wick & P S S Co* [1894] A C 318 324 *The Englishman and the Australia* [1895] P 212

[3] *Lakshmana Ayyan* v *Rangasami Ayyan* (1893) 17 Mad 78 80

[4] *Palmer* v *Wick & P S S Co* sup

[5] *Burrows* v *Rhodes* [1899] 1 Q B 816 828

[6] *Betts* v *Gibbins* (1834) 2 A & E 57 75

[7] *The Frankland* (1901) 17 T L R 419 See also the Maritime Conventions Act 1911 s 3 which creates a right of contribution between two ships in the case of loss of life or personal injuries where both ships are in fault

[8] Section 37 (3) of the Companies Act 1929 (19 & 20 Geo V c 23) Section 100 (4) of the Indian Companies Act 1913

[9] *Harnath* v *Haree Singh* (1872) 4 N W P 116 *Manja* v *Kadugochen* (1883) 7 Mad 89 *Gobind Chunder* v *Sri Gobind* (1896) 24 Cal 330 See to the same effect *Golam Hoosein* v *Imam Bux* (1866) P R No [illegible] 1866 in which contribution for dam[illegible] paid for libel was sought for [illegible] a right of contribution betw[illegible] defendants in respect to the [illegible] awarded against them and [illegible] one of them in such cases [illegible] *Prasad* v *Darbhanga Thiku* [illegible] 4 P L J 486 *Bhaguand*[illegible] *Singh* (1920) 24 O C [illegible] *Singh* v *Shiva Ratan* [illegible] 29 O C 7 See [illegible] *Arja Nand* (1889) [illegible] which decides that [illegible]

cases[1] It is held to apply in cases where the parties were wrong doers in the sense that they knew or ought to have known that they were doing an illegal or wrongful act[2] The correct view it is submitted is that while the right of contribution is based on the principle of justice that a burden which the law imposes on two men should not be borne wholly by one of them the rule in *Merryweather v Nixon* is not in conformity with justice and good conscience which after all is the guiding principle to be followed by the Courts in India

Now under the Law Reform (Married Women and Tort feasors) Act 1935 a tort feasor may recover contribution from any other tort feasor who is or who if sued would have been liable in respect of the same damage whether as a joint tort feasor or otherwise. No person shall be entitled to recover contribution from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought[3]

The amount of the contribution recoverable from any person shall be just and equitable having regard to the extent of his responsibility for the damage The Court can exempt any person from liability to make contribution or direct that the contribution from any person shall amount to a complete indemnity[4]

The plaintiff fell down a hole which had been left uncovered by the negligence of a contractor employed by the defendant to carry out certain works on the premises on which the plaintiff had come It was held that the contractor who was added as a third party to the suit was liable to contribute one half of the damages

FORMS OF ACTION

Early English law established formulary system It is a commentary upon the way in which the whole strength of the State was gathered

and liabilities of joint tort feasors *inter se* might be before a decree was passed, there was a right of contribution afterwards the matter having passed *in rem judicatum* In the case of a decree for mesne profits, a person who had to satisfy the entire decree can recover his share from his co-defendants *Sheo Ratan Singh v Karan Singh* (1924) 46 All. 860

[1] *Sita Panda v Jujusti Panda* (1901) 25 Mad 599 *Nihal Singh v The Collector of Bulandshahr* (1916) 38 All 237 *Sheo Ratan Singh v Karan Singh* sup *Bhagwandas v Rajpal Singh* (1920) 21 O C. 118 *Karya Singh v Shiva Ratan Singh* (1925) 29 O C 7 *Rajgopala Iyer v Arunachala Iyer* [1924] M W N 676 *Kamala Prasad Sukul v Kishori Mohan Pramanik* (1927) 48 C L J 350 *Basanta kumar Basu v Ramshankar Ray* (1931) 59 Cal 859 *Yegnanarayana v Yagannandha Rao* [1931] M W N 667 34 L W 618

Krishna Ram v Rakmini Sewak Singh (1887) 9 All 221 *Hari Saran Maitra v Jotindra Mohan* (1900) 5 C W N 393 *Suput Singh v Imrit Tewari* (1880) 5 Cal 720 *Shakul Hameed Sahib v Syed Ebrahim Sahib* (1902) 26 Mad 373 *Jhibu v Balaji* (1923) 19 N L R. 75 *Parbhu Dayal v Dwarka Prasad* (1932) 54 All 371 Express promise of indemnity is void in such cases *Yegnanarayana v Yagannadha Rao* sup

[3] 25 & 26 Geo V c. 30 s. 6 (1) (c)

[4] *Ibid* s 6 (2)

[5] *Burnham v Boyer and Brown* [1936] 2 All E R 1165

into the hands of the King and thereafter redistributed to various groups of royal officers In every case of force or fraud the question came to be whether there was a writ capable of issuing from the *Curia Regis*

Form of action is defined as the peculiar technical mode of framing the writ and pleadings appropriate to the particular injury which the action is intended to redress Each form of action was founded on a particular writ appropriate to it.

When the law of England was in its infancy an attempt was made to group all legal proceedings under a few special heads and to each head a special formula of claim or writ was assigned For wrongs of ordinary kind writs were provided but when a novel point arose very often it was not covered by a writ and the injured party could not get any redress

To do away with this difficulty the Statute of Westminster the Second[1] was enacted empowering the clerks of Chancery to frame writs similar to old ones (*in consimili casu*) where a novel point arose The clerks however had no power to deal with cases which were not in any way similar to old ones The Legislature added new writs from time to time and down to 1875 when the Judicature Act was passed a plaintiff could only sue in one or other recognized forms of action If the plaintiff selected the wrong form of action his suit was dismissed even though he was entitled to succeed on a different writ[2]

The Judicature Act 1875 replaced formal pleadings by a mere indorsement to such and such effect upon the writ of summons The effect of the Act was to obviate the inconvenience and expense to plaintiff who was non suited by reason of having selected the wrong form of action and consequently had to pay the defendant s costs. But in considering the question whether plaintiff has a cause of action under particular circumstances it is still of importance to inquire what would have been the form of action under the old practice.

There were three different classes of actions—real personal and mixed

In real actions the plaintiff claimed the right to recover lands tenements and hereditaments

In personal actions the plaintiff (1) claimed a debt or (2) sought to recover a chattel or damages in lieu thereof or (3) claimed damages for injury done to his person or property

Mixed actions partook of the nature of both personal and real actions Some real property as well as damages were claimed in such actions

So far as the law of torts is concerned it is only necessary to understand the general characteristics of personal actions and only one mixed action namely action of ejectment

1 13 Edw I c 24

2 *White* v *G W Ry Co* (1857) 2 C B N S 7

Personal actions were principally eight debt covenant assumpsit trespass on the case, detinue replevin and trover The actions of debt covenant and assumpsit were remedies available for the settlement of disputes in the nature of contract *Action of debt* lay for ascertained and liquidated sums *Covenant* lay for promise under seal *Assumpsit* was an action for the recovery of damages whether liquidated or unliquidated for the breach of a contract not under seal It lay for the breach of any parol or simple contract either express or implied The Common Law Procedure Act of 1854[1] abolished the distinction between *debt* and *assumpsit*

Trespass —The action of trespass could be maintained for injuries accompanied by immediate violence whether to real or personal property or to person This action was the earliest form of action for wrongs The action on the case trover and assumpsit gradually developed from it

In the case of wrongs to real property the formula for bringing an action of trespass was *quare clausum fregit* This action could also be brought for voluntary waste committed by a tenant

When goods were violently taken away and detained the owner could bring an action either in trespass detinue replevin or trover If the goods had been converted into money he could waive the tort and bring his action in assumpsit for money had and received

Trespass to the person lay for every direct application of force to a human being which is not purely and absolutely involuntary and accidental and is used without the consent of the person injured freely and consciously given and not induced by fraud Trespass to the person could be brought for assault battery mayhem and false imprisonment

In Henry III s reign trespass embraced what we call wrongs as well as what we call crimes Every felony says Bracton is a trespass a transgression of the law though every trespass is not a felony

Case —The action on the case was the remedy of the plaintiff who sought to recover damages in cases arising either *quasi ex contractu* or *quasi ex delicto* The former class included actions where there was a contractual relation between the parties but where the real ground of action was some breach of duty collateral to the actual contract e g malpractice on the part of a surgeon or deceit on the sale of goods or waste The second class included actions in respect of such wrongs as libel slander malicious prosecution negligence nuisance infringement of patent right etc In all cases where a man suffered damage by the wrongful act of another he could bring an action on the case

Actions on the case were either actions of trespass on the case i e actions in respect of wrongs similar to those the subject of trespass but unaccompanied by immediate violence or general actions on the case which provided remedy for every kind of wrong

[1] 17 & 18 Vic c 125 s. 78

Action on the case was given by the second Statute of Westminster 1285 where a party was sued for damages for any wrong or cause of complaint to which neither covenant nor trespass would apply Action of trespass was confined to malfeasance accompanied by force But trespass on the case came to apply to—malfeasance misfeasance and non feasance

The chief distinction between trespass and action on the case was that the former was brought in respect of violence either actual or implied where the matter affected was tangible and the plaintiff s interest was immediate while the latter was brought where the element of violence was absent or the matter affected was intangible or the injury was consequential or the interest was only in reversion In *Leat e* v *Bray*[1] Le Blanc J said In all the books the invariable principle to be collected is that where the injury is immediate on the act done there trespass lies but where it is not immediate on the act done but consequential there the remedy is in case And the distinction is well instanced by the example put of a man s throwing a log into the highway if at the time of its being thrown it hit any person it is trespass but if after it be thrown any person going along the road receive an injury by falling over it as it lies there it is case. trespass is the proper remedy for an immediate injury done by one to another but where the injury is only consequential from the act done there it is case Trespass lay for all direct injuries whether wilful or negligent case for all consequential injuries even if they were intended

Detinue —Detinue was the form of action for the recovery of specific goods wrongfully detained from the plaintiff by the defendant or their value and also damages occasioned by their detention

Replevin —The action of replevin lay to recover specific goods which had either been wrongfully distrained from the plaintiff or had been wrong fully taken out of his possession It did not lie to recover goods in which the plaintiff alleged merely that he had a right of property or which had been delivered under a contract

Trover —The action of trover was originally the remedy of the plain tiff to recover damages against the person who had found goods and refused to deliver them upon demand to the plaintiff and converted them to his own use. In course of time it became the form of action where a plaintiff sought to recover damages from a defendant who had converted the plaintiff s goods to his own use and came to be known as an action of conversion To maintain this action the plaintiff had to prove either an absolute or a special property in the goods in question and also a right to the possession of them. The action of trover was founded on the property in the goods the action of trespass on the possession of them In trover damages alone could be recovered

1 (1803) 3 East 593 602 603

CHAPTER X

CLASSIFICATION OF TORTS

Torts are infinitely various not limited or confined for there is nothing in nature but may be an instrument of mischief[1] All writers on the law of torts unanimously agree that it is difficult to classify torts with scientific accuracy Some writers subdivide one portion of the whole class of wrongful acts on one principle and another portion on another principle To frame a scheme of classification which shall be at once comprehensive accurate and easily intelligible is it seems a problem not yet solved and scarcely two writers have agreed to one and the same or a uniform scheme[2] The classification adopted in this work is based on the lines of

[1] Per Pratt C J in *Chapman* v *Pickersgill* (1762) 2 Wils. 145

[2] Sir Frederick Pollock classifies torts as follows —

GROUP A

Personal Wrongs

1 Wrongs affecting safety and freedom of the person —
   Assault battery false imprisonment
2 Wrongs affecting personal relations in the family —
   Seduction enticing away of servants
3 Wrongs affecting reputation —
   Slander and libel
4 Wrongs affecting estate generally —
   Deceit slander of title fraudulent competition by colourable imitation etc malicious prosecution conspiracy

GROUP B

Wrongs to Property

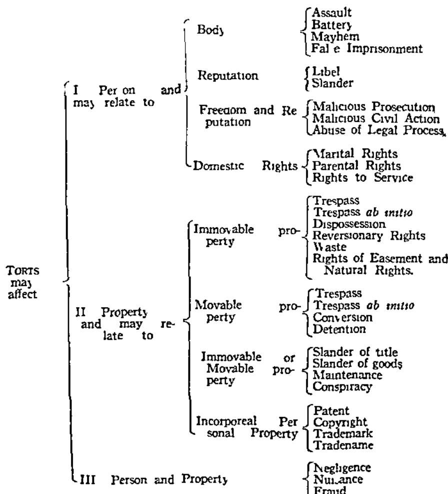
1 Trespass —(*a*) to land
   (*b*) to goods.
   Conversion and unnamed wrongs *ejusdem generis*
   Disturbance of easements, etc
2 Interference with right analogous to property such as private franchises, patents, copyright trademarks.

GROUP C

Wrongs to Person Estate and Property generally

1 Nuisance
2 Negligence.
3 Breach of absolute duties specially attached to the occupation of fixed property to the ownership and custody of dangerous things and to the exercise of certain public callings.

Sir Henry Finche's view of the English law "Our Law" he says[1] "regards the person above his possession—life and liberty most—freehold and inheritance above chattels, and chattels real above personal" Accordingly torts relating to person come first those affecting property—real and then personal—second and those concerning person and property in common third



[1] *Vide* Discourse of Law

TORTS TO PERSON

CHAPTER XI

ASSAULT AND BATTERY

AN assault is the unlawful laying of hands on another person or an attempt or offer to do a corporeal hurt to another coupled with an ap parent present ability and intention to do the act Actual contact is not necessary in an assault though it is in a battery But it is not every threat when there is no actual personal violence that constitutes an assault there must in all cases be the means of carrying the threat into effect[1] Any gestures calculated to excite in the party threatened a reasonable apprehension that the party threatening intends immedi ately to offer violence, or in the language of the Indian Penal Code, is about to use criminal force to the person threatened constitute if coupled with a present ability to carry such intention into execution an assault in law [2] The intention as well as the act makes an assault Therefore if one strike another upon the hand or arm or breast in dis course it is no assault there being no intention to assault but if one intending to assault strike at another and miss him this is an assault so if he hold up his hand against another in a threatening manner and say no thing it is an assault [3] The menacing attitude and hostile purpose go to make the assault unlawful e.g presenting a loaded pistol at any one,[4] or riding after a person and obliging him to seek shelter to avoid being beaten [5] Mere words do not amount to an assault But the words which the party threatening uses at the time may either give to his gestures such a meaning as may make them amount to an assault or on the other hand may prevent them from doing so For instance where A laid his hands on his sword and said to Z if it were not the assize time[6] I should not take such language from you [7] This was held not to be an assault on the ground that the words showed that A did not intend then and there

[1] *Tuberville* v *Savage* (1669) 1 Mod 3

[2] Per Arnould C J in *Cama* v *Morgan* (1864) 1 B H C 205 206

[3] *Stephens* v *Myers* (1830) 4 C & P 349

[4] *R* v *James* (1844) 1 C & K 530 *Osborn* v *Veitch* (1858) 1 F & F 317 The present view in America is that it will be an assault whether the pistol is loaded or not

[5] *Mortin* v *Shoppee* (1828) 3 C & P 373

[6] It was the assize time and the consequence of drawing a sword on another during assize time involved in those days (the latter end of Charles I s reign) not only the certain infliction of a heavy fine but the possible chop ping off of the hand by which the sword was drawn.

[7] *Tuberville* v *Savage* sup

to offer violence to Z (or in the language of the Indian Penal Code was not about to use criminal force to Z) Here there was the menacing gesture, showing in itself an intention to use violence there was the present ability to use violence, but there were also words which would prevent the person threatened from reasonably apprehending that the person threatening was really then and there about to use violence.[1]

For assault as an offence see Indian Penal Code s 351[2]

A battery is the actual striking of another person or touching him in a rude, angry revengeful or insolent manner In *Cole* v *Turner*[3] Holt C J declared (1) that the least touching of another in anger is a battery (2) if two or more meet in a narrow passage, and without any violence or design of harm the one touches the other gently it will be no battery and (3) if any of them use violence against the other to force his way in a rude inordinate manner it will be a battery or any struggle about the passage to that degree as may do hurt will be a battery

Battery includes assault It is mainly distinguishable from an assault in the fact that physical contact is necessary to accomplish it. It cannot mean merely an injury inflicted by an instrument held in the hand but includes all cases where a party is struck by any missile thrown by another It does not matter whether the force is applied directly or indirectly to the human body itself or to anything in contact with it Thus to throw water at a person is an assault if any drop falls upon him it is a battery[4] So too riding a horse at a person is an assault riding it against him is a battery Pulling away a chair as a practical joke from one who is about to sit on it is probably an assault until he reaches the floor for while he is falling he reasonably expects that the withdrawal of the chair will result in harm to him When he comes in contact with the floor it is a battery [5]

But every laying on of hands is not a battery The party s intention must be considered[6] Touching a person for instance, so as merely to call his attention is not a battery [7] A friendly clap on the back of a person may be excused on the ground of implied consent but not the hostile or rude hand

For battery as an offence see Indian Penal Code s 350

Leading case—STEPHENS v MYERS.

Advancing in an attitude of committing violence—In the leading case the plaintiff was the chairman of a parish meeting The defendant having been very vociferous, a motion was made and carried by a large majority that he should be turned out Upon this the defendant said he would rather pull the chairman out

[1] Per Arnould C J in *Cama* v *Morgan* (1864) 1 B H C 205
Civil Court is not bound by conviction or acquittal in criminal proceedings *Jagga Rao In re* (1935) 68 M L J 660 [1935] M W N 452

[3] (1794) 6 Mod 149

[4] *Pursell* v *Horne* (1838) 3 N & P 564

[5] Winfield on Torts pp 225 226

[6] *James* v *Campbell* (1832) 5 C & P 372

[7] *Coward* v *Baddeley* (1859) 4 H & N 478

of the chair than be turned out of the room and immediately advanced with his fist clenched towards him he was thereupon stopped by the churchwarden who sat next but one to the chairman at a time when he was not near enough for any blow he might have meditated to reach the plaintiff but the witnesses said that it seemed to them that he was advancing with an intention to strike the chairman The jury found for the plaintiff with one shilling damages. Tindal C J said It is not every threat when there is no actual personal violence that constitutes an assault there must in all cases be the means of carrying the threat *into effect The question I shall leave to you will be whether the defendant was* advancing at the time in a threatening attitude to strike the chairman so that his blow would almost immediately have reached the chairman if he had not been stopped then though he was not near enough at the time to have struck him yet if he was advancing with that intent I think it amounts to an assault in law If he was so advancing that within a second or two of time he would have reached the plaintiff it seems to me it is an assault in law [1]

Battery —A seizing and laying hold of a person so as to restrain him [2] spitting in the face [3] throwing over a chair or carriage in which another person is sitting [4] throwing water over a person [5] striking a horse so that it bolts and throws its rider [6] taking a person by the collar [7] causing another to be medically examined against his or her will [8] firing a gun carelessly and hitting another though the person firing never designed the shot to touch him [9] are all held to amount to battery

Forcible removal of a spectator from a theatre —Where the *plaintiff* who had purchased a ticket for a seat at a cinema show was forcibly turned out of his seat by the direction of the manager who was acting under a mistaken belief that the plaintiff had not paid for his seat it was held that the plaintiff was entitled to recover substantial damages The purchaser of a ticket for a seat at a theatre or other similar entertainment has a right to stay and witness the whole of the performance provided that he behaves properly and complies with the rules of the management.[10]

Mayhem is bodily harm whereby a man is deprived of the use of any member of his body or of any sense which he can use in fighting or by the loss of which he is generally and permanently weakened but a bodily injury is not a maim merely because it is a disfigurement [11] It seems that such a hurt of any part of a man s body whereby he is rendered less able in fighting either to defend himself or to annoy his adversary is properly a maim.[1] The cutting off or disabling or weakening a man s hand or finger

[1] *Stephens* v *Myers* (1830) 4 C & P 349
[2] *Rawlings* v *Till* (1837) 3 M & W 28
[3] *R* v *Cotesworth* (1704) 6 Mod 172
[4] *Hopper* v *Reeve* (1817) 7 Taunt 698
[5] *Pursell* v *Horne* (1838) 8 A & E. 602
[6] *Dodwell* v *Burford* (1681) 1 Mod. 24
[7] *Wiffin* v *Kincard* (1807) 2 B & P N R 471
[8] *Latter* v *Braddell* (1881) 29 W R. 239
[9] *Weaver* v *Ward* (1617) Hob 134 *Leame* v *Bray* (1803) 3 East 593 597
[10] *Hurst* v *Picture Theatres Limited* [1915] 1 K B 1
[11] Stephen s Digest 6th Edn 165
[1] Hawk. I 107

or striking out his eyes or foretooth or castrating him will be mayhem but not the cutting off his ear or nose etc as this does not weaken but only disfigures him.[1]

Civil liability —The fact that a defendant has been fined by a criminal Court for an assault is no bar to a civil action against him for damages[2] The previous conviction of the defendant in a criminal Court is no evidence of the assault The factum of the assault must be tried in the civil Court[3] A plea of guilty in a criminal Court may but a verdict of conviction cannot be considered in evidence in a civil Court[4]

Justification —Assault and battery may be justified in the following cases —

1 Self defence —It is a principle of plain common sense that a man when attacked should be permitted to defend himself The plea of *son assault demesne* means that the assault complained of was the effect of the plaintiff s own attack that is the blow was given in defending *the party s person family or property from the trespass of the plaintiff* But the defendant must not reply to the plaintiff s assault or trespass with a force and spirit altogether disproportionate to the provocation[5] For instance hitting a man a little blow with a little stick on the shoulder is not a reason for him to draw a sword and cut and hew the other If a man strike another who does not immediately after resent it but takes his opportunity and then—some time after—falls upon him and beats him *son assault* is no good plea[6]

2 In defence of the possession of a house, or goods and chattels If one man enter the house of another with force and violence the owner is justified in turning him out without a previous request to depart but if he enters quietly he must be first requested to retire before hands can be lawfully laid upon him to turn him out

3 To prevent a forcible entry or seizure of chattels The rightful owner (or his servant by his command) may justify an assault in order to repossess himself of land or goods which are wrongfully in the possession of another no unnecessary violence being used[7]

4 In exercise of parental or quasi parental authority i e for the correction of a pupil[8] child apprentice or sailor on board a ship Here the chastisement must not be excessive or unreasonable

[1] Hawk. I 107

[2] *Akhil Chandra Biswas v Akhil Chandra Dey* (1902) 6 C W N 915 *Jodhi Ram v Indul Mian* (1893) 13 A W N 62 *Chandan v Sumera* (1887) 7 A W N 101

[3] *Ali Buksh v Sheikh Samiruddin* (1869) 4 Beng L R (A C J) 31 *Bishonath v Huro Gobind* (1866) 5 W R 27

[4] *Shumboo Chunder v Modhoo* (1868) 10 W R 56

[5] *Reece v Tailor* (1835) 4 N & M 469

[6] Per Holt C J in *Cockcroft v Smith* (1706) 11 Mod 43

[7] *Blades v Higgs* (1861) 10 C B N S 713 *Anthony v Haney* (1832) 8 Bing 186

[8] *Cleary v Booth* [1893] 1 Q B 465 *Mansell v Griffin* [1908] 1 K B 160

5 By leave and licence of the party injured

6 In the preservation of the public peace Here the force used should not be more than what is necessary

7 For serving legal process including search under any law

Trespasser may be removed with force—A shopkeeper is not bound to sell goods at the prices marked over them and if one enters a shop and insists on having the goods and refuses to leave the shop force may be used to remove him.[1]

Forcible removal from a railway carriage—The plaintiff was a passenger by the defendants railway He having lost his ticket was unable to produce it when required. He was asked to pay the fare from the station whence the train originally started according to a condition published in the company's time table On his declining to do so he was forcibly removed by the defendants servants from the carriage in which he was travelling He sued the company for assault. It was held that as the contract between the plaintiff and the defendants did not authorize the removal of a person failing to pay under such circumstances the defendants were liable[2] The plaintiff entered a carriage on the defendants railway with the purpose of proceeding to B without procuring a ticket through oversight He asked for a ticket at intermediate stations but was refused At the last place where he asked for a ticket he was asked to get out of the carriage and on his not complying with this order he was forcibly removed from it In an action by the plaintiff for this forcible removal it was held that he was a trespasser and therefore his removal was not wrongful[3]

Damages—Damages in actions for assault and battery will vary according to the circumstances of each case But generally they should be exemplary

The circumstances of time and place as to when and where the assault was committed and the degree of personal insult must be considered in estimating the nature of the offence and the amount of damages It is a greater insult to be beaten in a public place than in a private room But if punishment in person is resorted to that must always be an important element in mitigation in subsequently estimating the amount of damages.[4] The plaintiff's position should be considered for the purpose of seeing how far the compensation awarded is commensurate with the injury inflicted[5] For the loss of an eye the plaintiff besides getting special damages is entitled to damages for loss of earnings medical expenses incurred pain and suffering loss of earning capacity and for risk of becoming permanently blind if the other eye is damaged[6] Damages should be commensurate to the injury and annoyance caused even though there has been no serious personal injury[7]

[1] *Timothy v Simpson* (1885) 1 Cr M & R. 757

[2] *Butler v Manchester Sheffield & Lincolnshire Ry* (1888) 21 Q B D 207

[3] *Pratab Daji v B B & C I Ry* (1875) 1 Bom 52

[4] *Misr Ramji v Jivan Ram* (1881) 1 A. W N 131

[5] *Joypal Roy v Mukoond Roy* (1872) 17 W R 280

[6] *Abdul Ghaffar Khan v Gokul Prashad* [1936] Nag 1

[7] *Ramjoy v Russell* (1864) W R.

When the assault has been carried to the extent of maiming or crippling or of wounding a person damages will be greater than those awarded for a mere assault or battery

In the case of a joint assault the true criterion of damage is the whole injury which the plaintiff has sustained from the joint act of trespass[1]

(Gap No) 370 *Bhyrau Pershad* v *Isharee* (1871) 3 N W P 313 A plaintiff in claiming damages for a criminal assault is not entitled to include in his claim costs incurred by him in successfully prosecuting the defendant for the hurt caused to the plaintiff by the defendant *Jagan Nath* v *Hakim* (1916) P R No 17 of 1916 *Lahori* v *Ram Chand* (1931) 32 P L R. 421 Where the damages awarded in compensation for an assault were beyond the means of the defendant the Court reduced them on the defendant s tendering a written apology to the plaintiff expressing his regret for what had passed *MacIver* v *Shungeshur Dutt* (1866) 6 W R 95

[1] *Clark* v *Newsam* (1847) 1 Ex 131 *Ramessur* v *Shib Narain* (1870) 14 W R 419

CHAPTER XII

FALSE IMPRISONMENT

False imprisonment is a total restraint of the liberty of a person for however short a time without lawful excuse[1] The word false means erroneous or wrong

To constitute this wrong two things are necessary —

(1) The total restraint of the liberty of a person

The detention of the person may be either (*a*) actual that is physical e g laying hands upon a person or (*b*) constructive that is by mere show of authority e g by an officer telling any one that he is wanted and making him accompany[2]

(2) The detention must be unlawful

The period for which the detention continues is immaterial But it must not be lawful[3]

Every confinement of the person is an imprisonment whether it be in a common prison or in a private house or in the stocks, or even by forcibly detaining one in the public streets[4] In the leading case of *Bird* v *Jones* Coleridge J said A prison may have its boundary large or narrow visible and tangible, or though real still in the conception only it may itself be moveable or fixed but a boundary it must have and that boundary the party imprisoned must be prevented from passing he must be prevented from leaving that place, within the ambit of which the party imprisoning would confine him except by prison breach Some confusion seems to me to arise from confounding imprisonment of the body with mere loss of freedom it is one part of the definition of freedom to be able to go whithersoever one pleases but imprisonment is something more than the mere loss of this power it includes the notion of restraint within some limits defined by a will or power exterior to our own[5] If one compels another to stay in any given place against his will he imprisons that other just as much as if he locked him up in a room The compelling a man to go in a given direction against his will may amount to imprisonment But if one man merely obstructs the passage of another in a particular direction whether by threat of personal violence

[1] *Bird* v *Jones* (1845) 7 Q B 742 752 *Syed Mahamad Yusuf ud din* v *Secretary of State for India* (1903) 30 I A 154 30 Cal 872

[2] See *Pocock* v *Moore* (1825) R & M 321

[3] *Henderson* v *Preston* (1888) 21 Q B D 362 *Morriss* v *Winter* [1930] 1 K B 243 The signing of a charge sheet standing alone is not evidence of anything directly causing the imprisonment of the person charged and will not support an action for false imprisonment against the person who signs *Sewell* v *The National Telephone Co Ltd* [1907] 1 K B 557 See *Patton* v *Haree Ram* (1868)) 3 Agra H C 409 *Rajah Pedda Vencatapa* v *Arootala* (1841) 2 M I A 504 as to unlawful detention.

[4] Blackstone 127

[5] *Bird* v *Jones* sup. p 744

or otherwise leaving him at liberty to stay where he is or to go in any other direction if he pleases he cannot be said thereby to imprison him Imprisonment is a total restraint of the liberty of the person for how ever short a time and not a partial obstruction of his will whatever in convenience it may bring on him.[1]

It is not necessary that a man s person should be touched Placing a party under the restraint of an officer who holds a writ for his arrest is an imprisonment without proceeding to actual contact A person could be imprisoned without his knowing it The plaintiff was suspected of stealing a keg of varnish from the aviation works of the defendant com pany where he was employed He was asked by two of the aviation works police to go to the defendant s office. He assented and they went to the company s office by a short cut pointed out by him He was invited to the waiting room and the two policemen remained somewhere in the neighbour hood In an action for false imprisonment it was held that the defendant company was liable because the plaintiff was not a free man from the moment that he came under the influence of the two works police Lord Atkin said A person can be imprisoned while he is asleep while he is in a state of drunkenness while he is unconscious and while he is a lunatic Those are cases where the person might properly complain if he were imprisoned though the imprisonment began and ceased while he was in that state Of course the damages might be diminished and would be affected by the question whether he was conscious of it or not [3]

A person is not under imprisonment after his release on bail [4]

Leading cases—BIRD *v* JONES WEST *v* SMALLWOOD

Insisting upon going on a footway—In the first leading case a part of a bridge generally used as a footway was appropriated for seats to view a boat race. The plaintiff insisted upon passing along the part so appropriated and attempted to climb over the enclosure The defendant pulled him back but the plaintiff succeeded in climbing over Two policemen were then stationed by the defendant to prevent him from passing onwards in the direction in which he wished to go The plaintiff was told to go back into the carriage way and proceed to the other side of the bridge if he pleased The plaintiff refused to do so and remained where he was so obstructed about half an hour It was held that this was no imprisonment [5]

Pointing out the person to be arrested—In the second leading case it was held that where a party lays a complaint before a Magistrate on a subject matter over which he has a general jurisdiction and the Magistrate grants a warrant

1 Per Patteson J in *Bird* v *Jones* (1845) 7 Q B 742 751 *Parankusam* v *Stuart* (1865) 2 M H C 396 *Warner* v *Reddiford* (1858) 4 C B N S 180 *Grain er* v *Hill* (1838) 4 Bing N C 212

3 *Meering* v *Graham White Aviation Company Limited* (1919) 122 L. T 44 53

4 *Mahammad Yusufuddin* v *Secretary of State* (1903) 30 Cal 872 P C.

5 *Bird* v *Jones* sup

upon which the party charged is arrested the party laying a complaint is not liable as a trespasser although the particular case be one in which the Magistrate had no authority to act. But where the complainant having accompanied the constable charged with the execution of the warrant pointed out to him the person to be arrested it was held that this was evidence of a participation in the arrest[1] The defendants by their agents gave the plaintiff into custody thinking that the plaintiff was guilty of theft. The agent signed the charge-sheet and in his evidence stated I did give him in charge It was held that this amounted to false imprisonment[2]

Lawful detention—If a wrong person is arrested and imprisoned under a decree to which he was no party the person setting the Court in motion is not liable for such arrest and imprisonment if he did not obtain the process fraudulently or improperly[3] Where the plaintiff's imprisonment took place under a warrant of the Bombay Small Causes Court issued in a regular manner and such Court being of competent jurisdiction the plaintiff was held to have no cause of action against the defendant who got him arres ed by a bailiff[4]

Detention of a person—The plaintiff paid a penny on entering a wharf belonging to the defendants to stay there till a boat should start and then be taken by the boat to the other side Then the plaintiff changed his mind and wished to go back The rules as to the exit from the wharf by the turnstile required a penny for any person who went through This the plaintiff refused to pay and he was by force prevented from going through the turnstile He then claimed damages for assault and false imprisonment It was held that the defendants were not liable as the toll imposed was reasonable and they were entitled to resist a forcible evasion of it[5] A miner descended a coal mine at 9 30 A M for the purpose of working therein He was entitled to be raised to the surface at the conclusion of his shift at 4 P M On arriving at the bottom of the mine he was ordered to do certain work which he wrongfully refused to do and at 11 A M he requested to be taken to the surface in a lift. His employers refused to permit him to use the lift until 1 30 P M although it had been available for the carriage of men to the surface from 1 10 P M and in consequence he was detained in the mine against his will for twenty minutes In an action for damages for false imprisonment it was held that on the principle of *volenti non fit injuria* the action could not be maintained[6]

Arrest and imprisonment by private persons and public officers

A wrongful arrest by a private person or by a public officer will constitute false imprisonment The arrest is wrongful if it is made without a warrant or by an illegal warrant or by a legal warrant executed at an unlawful time

Under the common law a private person may arrest one whom he

[1] *West v Smallwood* (1838) 3 M & W 418

[2] *Clubb v Wimpey & Co Ltd* [1936] 3 All E R 69

[3] *Bheema v Donti* (1875) 8 M H C. 38

[4] *Fisher v Pearse* (1881) 9 Bom. 1 *Bachoo v Velji* (1923) 25 Bom. L. R. 595 *Balbhaddar v Basdeo* (1906) 29 All 44

[5] *Robinson v Balmain New Ferry Co* [1910] A C 295

[6] *Herd v Weardale Steal Co* [1915] A C 67

reasonably suspects to have committed felony[1] or breach of the peace[2]

The English common law right of a private citizen to arrest does not apply to India after the enactment of the Indian Penal Code and the Criminal Procedure Code[3] Under the latter Code the right of arrest is governed by s. 59[4]

In a suit for false imprisonment it is incumbent upon the defendant to prove either (i) that he did not arrest or cause the arrest of the plaintiff or (ii) that the offence was cognizable and non bailable and had been committed in his presence If the defendant satisfies the Court as to either of these propositions the plaintiff s claim must fail It is not essential that a private individual in whose presence a non bailable and cognizable offence is committed should himself physically arrest the offender He may cause such offender to be arrested by another person[5] But a private individual should not be held responsible for a supervening arrest merely on the ground that the arrest was likely to follow from the information given[6]

Leading case—TIMOTHY v SIMPSON

Refusal to leave a shop—In the leading case the plaintiff entered the defend ant s shop to purchase an article in the shop when a dispute arose between the plaintiff and the defendant s shopman and the plaintiff refusing on request to go out of the shop the shopman endeavoured to turn him out and an affray ensued between them The defendant came into the shop during the affray and requested the plaintiff to leave the hop quietly but on his refusing to do so the defendant gave him in charge of a policeman who took him to a station house It was held that the defendant was justified under the circumstances in giving the plaintiff in charge of a policeman for the purpose of preventing a renewal of the affray

Arrest by police at the instance of a private person—Where a police-officer arrested the plaintiff an employee of the defendant bank after the authorized agent of the bank had signed a letter charging the plaintiff with a criminal offence and the arrest was effected as a direct consequence of the letter having been signed and in the event the plaintiff was unanimously acquitted of the offence at the High Court Sessions it was held that the defendant bank was liable for damages for false imprisonment[8]

As to when a public officer may arrest without a warrant see ss 4

[1] *Allen v Wright* (1838) 8 C & P 522 *Walters v Smith & Son Ltd* [1914] 1 K B 595

[2] *Timothy v Simpson* (1835) 1 Cr M & R 757

[3] *In re Gopal Naidu* (1922) 46 Mad 605 F B disapproving *In re Ramaswami Ayyar* (1921) 44 Mad 913 *Gouri Prosad Dey v Chartered Bank of India Australia and China* (1925) 52 Cal 615 *Graham v Henry Gidney* (1933) 60 Cal 955

[4] Act V of 1898

[5] *Gouri Prosad Dey v Chartered Bank of India Australia and China* sup

[6] *Graham v Henry Gidney* sup *Timothy v Simpson* (1835) 1 Cr M & R 757

[8] *Gouri Prosad Dey v Chartered Bank of India Australia and China* sup *Graham v Henry Gidney* sup

(*f*) 54 55 57 64 65 480 and 485 of the Criminal Procedure Code[1] and the Police Acts

Damages —The expenses incurred to regain freedom from false imprisonment may be calculated in awarding damages[2] Inconvenience and loss of reputation caused to the plaintiff should be taken into account[3]

[1] Act V of 1898

Mason v *Barker* (1843) 1 C & K 100

[3] *Madhub Chunder Sircar* v *Banee Madhub* (1871) 15 W R 85

CHAPTER XIII

DEFAMATION

EVERY man has an absolute right to have his reputation preserved inviolate This right of reputation is acknowledged as an inherent personal right of every person It is a *jus in rem* a right absolute and good against all the world A man s reputation is his property and if possible more valuable than other property [1] No mere poetic fancy suggested the truth that a good name is rather to be chosen than great riches Indeed if we reflect on the degree of suffering occasioned by loss of character and compare it with that occasioned by loss of property the amount of the former injury far exceeds that of the latter

The wrong of defamation may be committed either by way of speech or by way of writing or its equivalent The term slander is used for the former kind of utterances libel for the latter Slander is a spoken and libel is a written defamation

A libel is a publication of a false and defamatory statement tending to injure the reputation of another person without lawful justification or excuse The statement may be expressed in writing printing signs pictures etc

A slander is a false and defamatory verbal statement tending to injure the reputation of another

Difference between libel and slander—1 A libel is a written or a printed defamation A slander is a spoken defamation

2 A libel is a criminal offence as well as a civil wrong A slander is a civil wrong only though the words may happen to come within the criminal law as being blasphemous seditious or obscene or as being a solicitation to commit a crime or as being a contempt of Court [3]

3 A libel is of itself an infringement of a right and no actual damage need be proved in order to sustain an action A slander is actionable only when special damage can be proved to have been its natu al consequence or when it conveys certain imputations. An action may be maintained for defamatory words reduced into writing which would not have been actionable if merely spoken [4]

4 The actual publisher of a libel may be an innocent person quite unconscious of the nature of his act e g a porter or manager He will not be liable though his employer will be In the case of a slander if the publisher act con ciously and voluntarily he will be liable

[1] *Dixon v Holden* (1869) L R 7 Eq 488

[2] *De Crespigny v Wellesley* (1829) 5 Bing 392

[3] *R v Holbrook* (1878) 4 Q B D 42 46

[4] *Thorley v Earl of Kerry* (1812) 3 Camp 214

Three reasons are assigned for this difference —

(1) In a libel the defamatory matter is in some permanent form—in writing or painting—e g a statue effigy caricature signs or picture-marks on a wall A slander is in its nature transient and is in the form of spoken words or significant gestures

(2) A slander may be uttered in the heat of the moment and under a sudden provocation the reduction of the charge into writing and its subsequent publication in a permanent form show greater deliberation and raise a suggestion of malice [1]

(3) A libel conduces to a breach of the peace a slander does not This distinction which is recognized in the English law is severely criticised by the framers of the Indian Penal Code

In India both libel and slander are criminal offences see Indian Penal Code s 499

Libel

In order to found an action for libel it must be proved that the statement complained of is (1) false (2) in writing (3) defamatory and (4) published

1 False —The falsity of the charge is presumed in the plaintiff's favour [3] The burden of proof that the words are false does not lie upon the plaintiff Defamation of a person is taken to be false until it is proved to be true If a man is proved to have stated that which he knew to be false no one need inquire further Everybody assumes thenceforth that he was malicious that he did a wrong thing from some wrong motive [4]

2 Writing —The defamatory statements may be in writing or in printing or may be conveyed in the form of caricatures or any other similar representations e.g a scandalous picture [5] Defamation through the agency of mechanically reproduced pictures and words—for example a talking cinematograph film—constitutes a libel Princess Irina of Russia the wife of Prince Youssoupoff claimed damages for a libel contained in a sound film entitled Rasputin the Mad Monk alleging that Metro-Goldwyn Mayer Pictures Limited had published pictures and words in the film which were understood to mean that she therein called Princess Natasha had been raped or seduced by Rasputin The jury returned a verdict in favour of the Princess and awarded £ 25 000 damages and the trial Court entered judgment for her for that amount which was confirmed by the Court of Appeal Slesser L J said There can be no doubt that so far as the photographic part of the exhibition is concerned that is a permanent matter

[1] *Clement* v *Chivis* (1829) 9 B & C 172

[2] See the authors Law of Crimes 14th Edn s. 499 Comment.

[3] *Belt* v *Lawes* (1882) 51 L. J Q B 359

[4] Per Brett L. J in *Clark* v *Molyneux* (1877) 3 Q B D 237 217 followed in *Ratan* v *Bhaga* (1896) I J 376 See *Dhurmo Doss* v *Koylash* (1869) 12 W R. 372

[5] *Du Bost* v *Beresford* (1810) 2 Camp 511 *Carr* v *Hood* (1808) 1 Camp 355

to be seen by the eye and is the proper subject of an action for libel if defamatory I regard the speech which is synchronised with the photo graphic reproduction and forms part of one complex common exhibition as an ancillary circumstance part of the surroundings explaining that which is to be seen [1] There is a difference of opinion—though it has not been judicially decided—whether defamatory matter recorded on a gramophone disc is libel or slander [2]

3 Defamatory —Any words will be deemed defamatory which

(a) expose the plaintiff to hatred contempt ridicule or obloquy or

(b) tend to injure him in his profession or trade or

(c) cause him to be shunned or avoided by his neighbours

The test is whether the words would tend to lower the plaintiff in the estimation of right thinking members of society generally [3] For example it is libellous to publish that a newspaper proprietor is a libellous journalist [4] or that a barrister is a quack lawyer and mountebank and an impostor [5] or that a pleader got up a receipt with false recitals in respect of his remuneration [6] or that a zemindar is an insolent upstart [7] To say of a woman that she has been ravished is defamatory of her as tending to cause her to be shunned and avoided although it involves no moral turpitude on her part [8]

If the words are false and defamatory the law implies malice [9]

Defamatory statement must refer to plaintiff —In an action for defamation the plaintiff must show that the defamatory statement refers to him It is not necessary for this purpose that the plaintiff should have been described by his own name It is sufficient if he is described by the initial letters of his name or even by a fictitious name provided he can satisfy the Court that he was the person referred to [10] It is immaterial whether the defendant intended the defamatory statement to apply to the plaintiff or knew of the plaintiff's existence if the statement might reasonably be understood by those who knew the plaintiff to refer to him The reason is that a man publishing a libel does so at his own risk A person charged with libel cannot defend himself by shewing that he intended in his own breast

[1] *Youssoupoff* v *Metro Goldwyn Mayer Pictures Limited* (1934) 50 T L R 581 587

[2] Professor Winfield thinks it is slander *Law of Torts* p 259 In *Salmond on Torts* it is submitted that it is both libel and slander ninth edn p 396

[3] *Sim* v *Stretch* [1936] 2 All E R 1237

[4] *Wakley* v *Cooke* (1849) 4 Ex 511

[5] *Wakley* v *Healey* (1849) 7 C B 591

[6] *Vaidianatha Sastriar* v *Kasivasi Somasundara Thambiran* (1913) 24 M L J 8

[7] *Brij Nath Sarin* v *Byrne* (1912) 9 A L J 253

[8] *Youssoupoff* v *Metro Goldwyn Mayer Pictures* (1934) 50 T L R 581

[9] *Ogilvie* v *Punjab Akhbharat and Press Co* (1929) 11 Lah. 45 *Lieut Col Gidney* v *The A I & D E Federation* (1930) 8 Ran 250

[10] *Le Fanu* v *Malcolmson* (1848) 1 H & C 637 668.

money.[1] An obituary notice of a living person[2] and an ironical praise[3] or a caricature of an amateur golfer for advertising goods if his status is likely to be lost,[4] may be libels. The exhibition of a waxen effigy of a person who has been tried for murder and acquitted, in company with the effigy of notorious criminals, may be defamatory because this shows that although not found guilty he was a criminal himself.[5] The defendants published in a newspaper a photograph of one M. C. and a Miss X together with the words "Mr M. C. the race-horse owner and Miss X whose engagement has been announced." In an action by the plaintiff the wife of M. C. it was held that the publication was capable of conveying a meaning defamatory of the plaintiff, viz. that she was not the lawful wife of M. C. and was living with him in immoral cohabitation.[6]

It is not defamatory to allege of a man that he has reported certain acts, wrongful in law, to the police, viz. the keeping of automatic gambling machines for the use of members of a club.[7] Where the plaintiff's house maid re-entered the service of the defendant who thereupon telegraphed to the plaintiff "Edith has resumed service with us today. Please send her possessions and the money you borrowed also her wages," it was held that this was not defamatory of the plaintiff.[8]

INDIAN CASES.—Making and publicly exhibiting an effigy of a person calling it by the person's name and beating it with shoes, are acts amounting to defamation.[9] A wrote letters to the husband of X in which he alleged that X was a witch and had by her sorcery caused the death of some relations of A. A also made similar statements to their castemen. It was held that A was liable.[10] The defendant falsely published statements to the effect that plaintiff's wife was a woman of low caste between which and the plaintiff's own caste inter-marriage and intercourse of any kind were prohibited; upon this the plaintiff's brotherhood expelled him and his wife from caste. It was held that the above facts furnished ample grounds for an action for defamation.[11] Words which impute unworthiness to remain a member of a caste are defamatory.[12] A

[1] *Cheese v. Scales* (1842) 10 M. & W. 488.

[2] *McBride v. Ellis* 9 Rich. 313.

[3] *Boydell v. Jones* (1838) 4 M. & W. 446; *Hick's case* (1618) Poph. 139.

[4] *Tolley v. J. S. Fry & Sons Ltd.* [1931] A. C. 333.

[5] *Monson v. Tussauds* [1894] 1 Q. B. 671.

[6] *Cassidy v. Daily Mirror Newspapers* [1929] 2 K. B. 331.

[7] *Byrne v. Deane* [1937] 1 K. B. 818.

[8] *Sim v. Stretch* [1936] 2 All E. R. 1237.

[9] *Pitumber Doss v. Dwarka Pershad* (1870) 2 N. W. P. 435. Burning a man in effigy is a libel: *Eyre v. Garlick* (1878) 42 J. P. 68.

[10] *Shoobhagee Koeri v. Bokhori Ram* (1906) 4 C. L. J. 390. It was further held that the husband had no cause of action against A.

[11] *Sant v. Bhag Mal* (1882) P. R. No. 140 of 1882.

[12] *Coopoosami Chetty v. Duraisami Chetti* (1909) 33 Mad. 67; *Raiunni Menon v. Neelakandan Nambudri* [1934] M. W. N. 345. But a person is not liable for defamation when the words used do not amount to saying that the plaintiff has lost caste or has done acts which necessarily involve the losing of caste but simply amount to an expression of unwillingness on the part of the defendant to associate with the plaintiff or to utilize his services by reason of his sympathy with widow marriage shown by dining with remarried widows or associating with persons who have dined with them: *Venkataramiah v. Venkataramiah* (1915) 28 M. L. J. 58.

single letter may not be defamatory but the cumulative effect of several letters may be so.[1]

Judge and jury.—In England it is the duty of the Judge to say whether a publication is capable of the meaning ascribed to it by an *innuendo* but when the Judge is satisfied of that it must be left to the jury to say whether the publication has the meaning so ascribed to it[2] that is whether in fact it is defamatory[3]

4 **Publication.**—Communicating defamatory matter to some person other than the person of whom it is written is publication in its legal sense.[4] If the statement is sent straight to the person of whom it is written, there is no publication of it for you cannot publish a libel of a man to himself[5] That cannot injure his reputation though it may injure his self esteem A man s reputation is the estimate in which others hold him not the good opinion which he has of himself The words complained of should be communicated to some person other than the plaintiff[6] But if the defamatory matter be transmitted in a telegram[7] or be written on a post-card and sent to the person libelled[8] it is a publication Facilities for postal and telegraphic communications are not to be used for the purpose of easily disseminating libels Again if the defendant knows that the letters sent to the plaintiff are usually opened by his clerk and the defendant sends a libellous letter which is in fact opened by the clerk the defendant is liable[9] But if a servant in breach of his duty and out of curiosity takes a letter out of an unclosed envelope and reads it there is no publication[10]

A communication to a husband or wife of a charge against the wife or husband constitutes a sufficient publication[11] But uttering of a libel

[1] *Irwin* v *Reid* (1920) 48 Cal 304

[2] Per Wilde C J in *Stuart* v *Blagg* (1847) 10 Q B 906 908 *The Capital and Counties Bank Limited* v *Henty* (1882) 7 App Cas 741

[3] *Tolley* v *J S Fry & Sons Ltd* [1931] A. C 333 338 *Stubbs Ltd* v *Russell* [1913] A C 386 *Stubbs Ltd* v *Mazure* [1920] A C 66

[4] Publication does not require communication to more persons than one *Govindan Nair* v *Achutha Menon* (1915) 39 Mad 433 Sending of a defamatory article to the editor and printer of a newspaper constitutes publication The appearance of the article in the paper is a second publication and constitutes a separate cause of action *Makhanlal* v *Panchamlal* (1934) 31 N L. R. 27

[5] Per Esher M. R. in *Pullman* v *Hill* [1891] 1 Q B 524 525 *Komul Chunder* v *Nobin Chunder* (1868) 10 W R 184 *Mohamed Ismail* v *Mohamed Tahir* (1873) 6 N W P 38 *Rawlins* v *Anant Lal* (1920) 2 P L T 176

[6] *Barrow* v *Lewellin* (1615) Hob 62 *Pullman* v *Hill* [1891] 1 Q B 524

[7] *Whitfield* v *S E Ry* (1858) E B & F 115 *Williamson* v *Freer* (1874) L R 9 C P 393

[8] *Robinson* v *Jones* (1879) L R 4 Ir 391 See *Sadgrove* v *Hole* [1901] 2 K B 1

[9] *Delacroix* v *Thevenot* (1817) 2 Stark 63 *Gomersall* v *Davies* (1898) 14 T L R 430 See *Keogh* v *Dental Hospital of Ireland* [1910] 2 I R 577

[10] *Huth* v *Huth* [1915] 3 K B 32

[11] *Wenman* v *Ash* (1853) 13 C. B 836 *Jones* v *Williams* (1885) 1 T L. R 572 *Shoobhagee Koer* v *Bokhori Ram* (1906) 4 C. L. J 390

by a husband to his wife is no publication on the common law principle that husband and wife are one.[1]

A person cannot excuse himself on the ground that he published the libel by accident or mistake - or in jest [3] or with an honest belief in its truth Publication need not be intentional It is sufficient if it is due to the negligence of the defendant e g circulating a book containing the libel [4] If there is no negligence then the innocent disseminator of defamatory matter is not liable e g where a news vendor sells a paper containing defamatory statement [5]

If a person expressly or impliedly assents to the publication of matter which is true the defendant is not liable [6]

Again the publication must be without just cause or excuse (i e malicious as it is sometimes called) or on an unprivileged occasion

Where there is a duty whether of perfect or imperfect obligation as between two persons which forms the ground of privileged occasion the person exercising the privilege is entitled to take all reasonable means of so doing and those reasonable means may include the introduction of third persons where that is reasonable and in the ordinary course of business e g where a business communication containing defamatory statements concerning the plaintiff is communicated by the defendant to his clerks in the reasonable and ordinary course of business there is no publication [7] If a business communication is privileged as being made on a privileged occasion the privilege covers all incidents of the transmission and treatment of that communication which are in accordance with the reasonable and usual course of business and it is in accordance with the reasonable and usual course of business for a business man to dictate his business letters to a typist even although these letters contain statements defamatory of a third person [8]

Publication—A solicitor acting on behalf of his client wrote and sent to the plaintiff a letter containing defamatory statements regarding her The letter was dictated to a clerk in the office and was copied into the letter book by

[1] *Wennhak v Morgan* (1888) 20 Q B D 635

[2] *Blake v Stevens* (1864) 4 F & F 232 *Shepheard v Whitaker* (1875) L. R. 10 C P 502

[3] *Donoghue v Hayes* (1831) Hayes Ir Ex Rep 265

[4] *Vizetelly v Mudie's Select Library* [1900] 2 Q B 170

[5] *Emmens v Pottle* (1885) 16 Q B D 354

[6] *Cookson v Harewood* [1932] 2 K B 478

[7] *Edmondson v Birch & Co Ltd & Horner* [1907] 1 K B 371 *Boxsius v Goblet Freres* [1891] 1 Q B 842 *Roff v British and French Chemical Manufacturing Co* [1918] 2 K B 677 *Heckford v Calstin* (1864) 2 Hyde 274 will be considerably modified in the light of recent English decisions. If a statement is false to the knowledge of the defendant then there is an end of privilege and publication of such statement to his clerk will not be protected *Vaidianatha Sastriar v Somasundara Thambiram* (1913) 24 M L J 8

[8] *Osborn v Thomas Boulter & Son* [1930] 2 K B 226 dissenting from *Pullman v Hill & Co* [1891] 1 Q B 524 as a decision on fact and following *Edmondson v Birch & Co* [1907] 1 K B 371

another clerk. In an action against the solicitor for libel it was h[illegible] publication to his clerks was necessary and usual in the discharge [illegible] his client and was made in the interest of the client.[1] Where [illegible] some friends a ludicrous story about himself and the defend[illegible] his newspaper simply for the purpose of amusing his readers [illegible] the plaintiff would not object the defendant was held liable.[2] The p[illegible] elected to the office of guardian of the poor for a certain paris[illegible] rate-payers of the parish and entitled to vote at the election [illegible] of guardians a letter complaining that the plaintiff was guilty [illegible] with drink and he had tampered with some of the voting [illegible] of guardians could take no action in the matter and had no [illegible] the plaintiff's election though the defendants honestly bel[illegible] of guardians was the proper authority to whom to apply. It [illegible] occasion was not privileged and the defendants were liable [illegible] which the plaintiff had proved to be untrue.[3]

Jurisdiction.—The defendant posted a newspaper (alle[illegible] upon a plaintiff) at Agra addressed to C at Lahore and [illegible] delivered to C's servant at Lahore and forwarded by him [illegible] at Amritsar where C was temporarily staying. It was h[illegible] was at Lahore and the civil Court at that place had juri[illegible] suit.[4]

Judge and jury.—In England as regards the questi[illegible] it is for the jury to find whether the facts on which [illegible] prove publication are true but for the Judge to decid[illegible] as proved constitute a publication.

Newspaper libel.—If a libel appear in a new[illegible] the editor the printer and the publisher are li[illegible] separately or together. In all cases of joint pub[illegible] is liable for all the ensuing damage. The propri[illegible] which appears in its columns even though the p[illegible] absence without his knowledge or even contra[illegible]

Where a libel is contained in a newspaper th[illegible] newspaper containing the libel is *prima facie* a p[illegible] ing the distributor as well as the principal resp[illegible] the defendant is excused if he can prove (1) that [illegible] contained a libel (2) that his ignorance was not [illegible] his own part and (3) that he did not know and [illegible]

1 *Boxsius* v *Goblet Freres* [1894] 1 Q B 842. *Cook* v *Ward* (1830) 6 Bing 409.

2 *Hebditch* v *MacIlwaine* [1894] 2 Q B 54. *Thompson* v *Dashwood* in which the defendants wrote defamatory statements of the plaintiff in a letter to W under circumstances which made the publication of the letter to W privileged but by mistake the letter was placed [illegible] another per[illegible] the defend[illegible] the ground [illegible] was disap[illegible] (1883) 11 [illegible]

3 *Dengo* [illegible] 33 of 18[illegible]4

4 *Dira* [illegible] (19[illegible]9) 10 [illegible]

posing that the newspaper was likely to contain libellous matter[1] This principle is only applicable where the defendant is a person who is not the printer of the first or main publisher of a work which contains a libel but has only taken a subordinate part in disseminating it[2]

A journalist who publishes complaints of a defamatory nature which are not true is not specially privileged on the contrary he has a greater responsibility to guard against untruths for the simple reason that his utterances have a larger publication than have the utterances of the individual and they are more likely to be believed by the ignorant by reason of their appearing in print[3]

Slander

1 ENGLISH LAW

As in the case of a libel it must be proved that the words complained of are (1) false, (2) defamatory (3) published by the defendant and (4) some special damage has resulted from their use

Where a document containing defamatory statements is published by being read out to a third person or where the publication of the defamatory statement is to a clerk to whom it is dictated the communication in either case amounts to slander and not to libel according to Scrutton and Slesser L JJ Greer L J holds that such communication amounts to libel[4]

The special damage must appear to be the natural consequence of the words spoken To make the words actionable by reason of special damage the consequence must be such as taking human nature as it is with its infirmities and having regard to the relationship of the parties concerned might *fairly* and reasonably have been anticipated and feared would follow from the speaking of the words not what would reasonably follow or we might think ought to follow[5] e g the loss of a customer[6] or the loss[7] or refusal[8] of some appointment or employment[9] or the loss of a gift[10] or of hospitality of friends[11] or the loss of the consortium of ones husband[12] Mental anguish accompanied by the im

[1] *Emmens* v *Pottle* (1885) 16 Q B D 351

[2] Per Romer L J in *Vizetelly* v *Mudie s Select Library* [1900] 2 Q B 170 180

[3] *Khair ud Din* v *Tara Singh* (1926) 7 Lah 491 see *The Englishman Ltd* v *The Hon ble Antonio Annabene* (1930) 35 C W N 271 52 C L J 315 where the plaintiff s complaint about an interview was published along with the editor s note as to the reliability of the reporter who took the interview

[4] *Osborn* v *Thomas Boulter & Son* [1930] 2 K B 226

[5] Per Lord Wensleydale in *Lynch* v *Knight* (1861) 9 H L C 577 595 600 *Speake* v *Hughes* [1904] 1 K B 138

[6] *Storey* v *Challands* (1837) 8 C & P 234 *Riding* v *Smith* (1876) 1 Ex D 91

[7] *Payne* v *Beuwmorris* (1669) 1 Lev 248

[8] *Sterry* v *Foreman* (1827) 2 C & P 592

[9] *Martin* v *Strong* (1836) 5 A & E 535

[10] *Corcoran* v *Corcoran* (1857) 7 Ir C L R 272.

[11] *Moore* v *Meagher* (1807) 1 Taunt. 39 *Davies* v *Solomon* (1871) L R 7 Q B 11

[12] *Lynch* v *Knight* (1861) 9 H L C 577 589

pairment of the physical health of the person slandered is not such special damage as will enable a party to maintain an action.[1] In this case an action was brought by husband and wife for slander imputing incontinency to the wife, alleging that by reason thereof the wife became ill and unable to attend to her necessary affairs and business and that the husband was put to expense in endeavouring to cure It was held that no action lay [2]

Where the words are not *per se* defamatory in their ordinary sense or have no meaning at all in ordinary acceptation there must be an *innuendo* in order to admit evidence that in a peculiar sense they are defamatory [3]

Words not actionable without special damage —To call a man a swindler[4] or a cheat,[5] or a blackleg[6] is not actionable without special damage

Too remote damage —The plaintiff alleged that he had engaged a performer to sing at his oratorio and that the defendant published a libel concerning her in consequence of which she was prevented from singing from an apprehension of being hissed whereby the plaintiff lost the benefit of her services it was held that the injury complained of was too remote.[7]

An action of slander may be maintained without proof of special damage in the following cases —

1 If a criminal offence (not necessarily an indictable offence) be imputed to the plaintiff [8]

2 If a contagious or infectious disorder tending to exclude the plaintiff from society be imputed to him

3 If any injurious imputation be made affecting the plaintiff in his office profession trade or business [9]

4 If the plaintiff is a woman or girl and the words impute unchastity or adultery to her [10]

In the above cases the imputation cast on the plaintiff is on the face of it so injurious that the Court will presume without any proof that his reputation has been thereby impaired Spoken words which afford a cause of action without proof of special damage are said to be actionable *per se*

1 Crime —Spoken words are actionable if they impute a crime that is to say words which in the opinion of the tribunal which ultimately deals with the matter appear to have been not necessarily intended by the speaker to impute a crime but capable of being understood by the

1 *Allsop* v *Allsop* (1860) 5 H & N 534

2 *Ibid*

3 *Rawlings* v *Norbury* (1858) 1 F & F 341

4 *Savile* v *Jardine* (1795) 2 H Bl 532

5 *Savage* v *Robery* (1699) 2 Salk 694 *Hopwood* v *Thorn* (1849) 8 C B 293

6 *Barnett* v *Allen* (1858) 3 H & N 376

7 *Ashley* v *Harrison* (1793) 1 Esp 47 *Chamberlain* v *Boyd* (1883) 11 Q B D 407

8 *Webb* v *Beavan* (1883) 11 Q B D 609

9 *Watkin* v *Hall* (3 C B 396 *Foulger* v L R. 2 Ex. 327

10 Slander of W & 55 Vic. c. 51

hearers as imputing a crime [1] The crime or misdemeanour must be one for which corporeal punishment[2] may be inflicted e g murder [3] robbery [4] perjury [5] adultery [6] theft [7] tampering with the loyalty of sepoys [8] etc Mere liability to arrest is not sufficient to make the crime one for which the offender can be said to suffer corporally [9] Arrest is not a punishment Where the penalty is merely pecuniary an action will not lie even though in default of payment imprisonment is prescribed by the statute imprisonment not being the primary and immediate punishment for the offence [10]

Words merely imputing suspicion of a crime are not actionable without proof of special damage [11]

2 Contagious disease —Words imputing to the plaintiff that he has an infectious or contagious disease are actionable without proof of special damage such as leprosy venereal disease plague itch [1] etc For the effect of such an imputation is naturally to exclude the plaintiff from society An assertion that the plaintiff has had such a disease is not actionable because it is no reason why the company of such person should be avoided [13]

3 **Office, profession or trade** —Where words affect a plaintiff in his office, profession or trade and directly tend to prejudice him therein no further proof of damage is necessary It must be shown that he held such office or was actively engaged in such profession or trade at the time the words were spoken.[14] While mere criticism upon a manufacture or goods is lawful an imputation upon a man in the way of his trade is even without special damage properly the subject of an action.[15] Otherwise proof of special damage will be required The words must impeach the plaintiff s official or professional conduct or his skill or knowledge His special office or profession need not be expressly named or referred to if the charge made be such as must necessarily affect him

[1] *Marks* v *Samuel* [1904] 2 K B 287 290

[2] *Webb* v *Beavan* (1883) 11 Q B D 609 *Lemon* v *Simmons* (1888) 57 L J Q B 260

[3] *Button* v *Hayward* (1722) 8 Mod 24

[4] *Roucliffe* v *Edmonds* (1840) 7 M & W 12 *Laurance* v *Woodward* (1625 41) Cro Car 277

[5] *Bridges* v *Playdel* (1675) Br & G 2 *Roberts* v *Camden* (1807) 9 East 93

[6] *Ratan* v *Bhaga* (1896) P J 376 *Jogeswar Sarma* v *Dinaram Sarma* (1898) 3 C L J 140

[7] To call a man a thief would *prima facie* be actionable without allegation of special damage but if the words were used as abuse it would not be *Cristie* v *Cowell* (1790) 1 Peake N P C 4

[8] *The Englishman* v *Lala Lajput Rai* (1910) 14 C W N 713

[9] *Hellwig* v *Mitchell* [1910] 1 K B 609 614

[10] *Ogden* v *Turner* (1705) 6 Mod. 104

[11] *Simmons* v *Mitchell* (1880) 6 App Cas 156

[12] *Villers* v *Monsley* (1769) 2 Wils 403

[13] *Taylor* v *Hall* (1742) 2 Str 1189 *Bloodworth* v *Gray* (1844) 7 M & G 334 *Carslake* v *Mapledoram* (1788) 2 T R 473

[14] *Bellamy* v *Burch* (1847) 16 M & W 590

[15] *Linotype Company Limited* v *British Empire Type setting Machine Company Limited* (1899) 81 L T 331

in it If a certain degree of ability skill or training be essential to the due conduct of his office or profession words denying his skill and ability or disparaging his training are actionable for they imply that he is unfit to continue therein The words must touch the plaintiff in his office or profession [1] But words which merely charge him with some misconduct outside his office or not connected with his special profession or trade, will not be actionable [2] For example an imputation of immorality against the head master of a school made without any relation to his position as a school master is not actionable *per se* [3]

Office paid and honorary—A distinction exists between an office of profit and an office of honour or credit In the former case an action lies without proof of special damage for any words which impute to the holder thereof—(1) gross misconduct in the discharge of his duties (2) any misconduct which if proved against him would be ground for depriving him of his office, e.g want of integrity or malversation and (3) unsuitableness for the office, incompetency or want of ability [4] Here the law presumes such a probability of pecuniary loss from the words imputed that it will not require special damage to be shown

If the office be one of credit or honour then an action lies without proof of special damage in cases (1) and (2) but not in the third case The implied damage is the risk of deprivation of the office of honour or credit which he holds [5]

4 Unchastity—At common law words imputing unchastity to a woman were not actionable without proof of special damage But the Slander of Women Act 1891 [6] has abolished the need of showing special damage in the case of words which impute unchastity or adultery to any woman or girl

2 INDIAN LAW

The common law rule that slander is not actionable *per se* has not been followed in India except in a few decisions The reason given is that the rule is not founded in any obvious reason or principle and that it is not consonant with justice equity and good conscience

The Indian cases fall under three categories namely —

(1) Where the words complained of are words of vulgar abuse

(2) Where they impute unchastity to a woman

[1] *Doyley* v *Roberts* (1837) 3 Bing N C 835

[2] *Lumby* v *Allday* (1831) 1 Cr & J 301 In this case the plaintiff was a clerk of a gas company and the defendant spoke of him you are a fellow or a disgrace to the town unfit to hold your situation for your conduct with whores. It was held that the words were not actionable

[3] *Jones* v *Jones* [1916] 2 A C. 481

[4] *Booth* v *Arnold* [1895] 1 Q B 571 576 *Alexander* v *Jenkins* [1892] 1 Q B 797

[5] *Alexander* v *Jenkins* ibid.

[6] 54 & 55 Vic. c. 51

(3) Where they tend to lower the character of the plaintiff in respect of his caste

(1) Vulgar abuse—In India a distinction has been made between abusive language which amounts merely to an insult and abusive language which is both insulting and defamatory In the former case it has been held following the English law that no action lies at all [1] in the latter that an action does lie even without proof of special damage The leading case on the subject is *Parvathi* v *Mannar* [2] In that case the defendant abused the plaintiff and said that she was not the legally married wife of her husband but a woman who had been ejected from several places for unchastity It was held that the defendant was liable though no special damage was proved In the course of his judgment, Turner C J said —

Mere hasty expressions spoken in anger or vulgar abuse to which no hearer would attribute any set purpose to injure character would of course not be actionable but when a person either maliciously or with such carelessness to enquire into truth as is sometimes described as legal malice deliberately defames another we conceive that he ought to be held responsible for damages for the mental suffering his wrong doing occasions Without accepting the very wide rule of the Scotch law that anything is actionable which produces uneasiness of mind we consider the action should be allowed where the defamation is such as would cause substantial pain and annoyance to the person defamed though actual proof of damage estimable in money may not be forthcoming

The point of the decision appears to be that mental distress caused by abusive words which amount merely to an insult is not actionable, but mental distre s caused by words of abuse which are also defamatory is actionable and no special damage need be proved This of cour e is a departure and a wholesome departure from the common law of England *Parvathi s* case has been followed in numerous decisions where the words complained of were both abusive and defamatory [3] As against

[1] *Girish Chunder* v *Jatadhari* (1899) 26 Cal 653 F B where the words used were sala haram zada soor and bepar beta *Bhoomi Money* v *Natobar Biswas* (1901) 28 Cal 452 *Girwar Singh* v *Siraman Singh* (1905) 32 Cal 1060 *Maung Kyaw* v *Tha Dun U* (1907) 4 L B R 50 *Girdhari Lal* v *Panjab Singh* (1933) 34 P L R 1071

[2] (1884) 8 Mad 175 180 *Konee Subhadra* v *Subbarayadu* (1900) 10 M L J 83 *Rogers* v *Hajee Fakir Muhammad* (1918) 35 M L J 673 *Subbaraidu* v *Sreenivasa Charyulu* (1926) 52 M L J 87

[3] *Dawan Singh* v *Mahip Singh* (1888) 10 All 425 where the words conveyed the meaning that the plaintiff s descent was illegitimate *Harakh Chand* v *Ganga Prasad* (1925) 47 All 391 where the words complained of were bahinchod sala and harami (bastard) *Sagar Ram* v *Badu Ram* (1904) 1 A L J 102 where the words complained of were that the plaintiff drank wine committed adultery and had no religion *Subbaraidu* v *Sreenivasa Charyulu* sup where the defendant called the plaintiff who was a rival candidate at an election a drunkard in public

these decisions, there is an old Bombay case,[1] where it was held that mere verbal abuse was actionable without proof of special damage on the ground that it would cause an outrage to the plaintiff's feelings This case is not likely to be followed even in Bombay

None of the above cases it may be noted arose in the town of Calcutta Madras or Bombay

In ult it may be observed is an offence under s 503 of the Indian Penal Code if the provocation is such as to cause a breach of the public peace

During the trial of a criminal case instituted by A against B for cheating A was asked in cross-examination by B s pleader whether B s firm was the largest firm of green dealers in the city and A said Yes Thereupon R the mukhtar who was appearing for A in the case interjected the remark audible to several persons in Court, that B s firm was also the most dishonest in the city The case terminated in a dismissal of the complaint B then sued R for *damages for slander It was held that the imputation was defamatory and* was therefore actionable without proof of special damage It would seem that the imputation was in the way of B s trade if so it would be actionable *per se* under the English law and the distinction made by the Court between the English and Indian law of slander was unnecessary

The omission of a mere courtesy could not be taken to be equivalent to slandering or libelling a man and was not an actionable wrong[3] A railway guard having reason to suppose that a passenger travelling by a certain train from Madras to Chingleput had purchased his ticket at an intermediate station called upon the plaintiff and others of the passengers to produce their tickets As a reason for demanding the production of the plaintiff s ticket he said to him in the presence of the other passengers I suspect you are travelling with a wrong (or false) ticket, which was the defamation complained of The guard was held to have spoken the above word *bona fide* It was held that the plaintiff was not entitled to recover damages[4]

(2) Imputing unchastity to a woman —An imputation of unchastity to a woman is actionable in England under the Slander of Women Act 1891[5] without proof of special damage. It was not so at common law The English Act however does not extend to India The question then arises whether in India words imputing unchastity to a woman are actionable without proof of special damage In a case which arose in the town of Calcutta the High Court of Calcutta applied the common law rule and held that the words were not actionable in the absence of proof of special damage.[6] In a case however which arose in the mofussil

[1] *Kashiram* v *Bhadu* (1870) 7 B H C (A C J) 17 In Burma this case is followed. But see *Mi Nu* v *Nue Mi* (1898) 5 Burma L R. 33 *Ma Pan Ye* v *Maung Pan Aung* (1905) U B R. Tort (1904 05) 1

[2] *Rahim Baksh* v *Bachcha Lal* (1929) 51 All 509

[3] *Sri Raja Sitarama* v *Sri Raja Sanyasi* (1866) 3 M H C 4

[4] *South Indian Ry* v *Ramakrishna* (1889) 13 Mad 34

[5] 54 & 55 Vic. c 51

[6] *Bhoomi Money* v *Natobar Biswas* (1901) 28 Cal. 452.

of Calcutta the same High Court held that such an imputation was actionable without proof of special damage and further that it was also actionable at the suit of the husband as the imputation involved that the husband ate the food cooked by an unchaste woman and had therefore lost his caste[1] The Madras High Court has held that a suit for defamation in respect of spoken words imputing unchastity is maintainable by a Hindu woman on the Original Side of the High Court without proof of special damage[2] The Bombay High Court has held that though Parsis are governed by common law yet words imputing adultery to a Parsi married woman are actionable without proof of special damage as adultery with a married woman is an offence under the Penal Code[3]

(3) Aspersion on caste—It is actionable without proof of special damage to say of a high caste woman that she belongs to an inferior caste The action may be brought not only by the woman but by her husband for if the husband himself is a high caste Hindu the imputation would involve that he has married a low caste woman[4]

The plaintiff sued certain persons for damages for defamation for having in the course of a caste inquiry declared him an outcaste for committing adultery without giving him an opportunity to vindicate his character It was held that the defendants had not acted *bona fide* in making the declaration and that the plaintiff was entitled to recover damages.[5]

Repetition of libel and slander

It is no defence to an action for libel or slander that the defendant published it by way of repetition or hearsay Tale bearers are as bad as tale makers Every repetition of defamatory words is a new publication and a distinct cause of action[6]

A man who receives from the hands of another a libel on any person is not justified in publishing that libel provided that in his publication the name of the person from whom he received it is mentioned[7]

[1] *Sukan Teli* v *Bipal Teli* (1906) 4 C L J 388 In this case it was held that the words imputing unchastity to a person s wife constituted defamation not only of the wife but also of the husband himself and he was therefore entitled to maintain an action on his own account The former Chief Court of Upper Burma was of opinion that special damage was not essential where there was a false charge of unchastity *Nga Nyo* v *Mi Te* (1915) U B R (1914 16) 98 *Ma Win* v *Ma Ngon* (1922) 1 Burma L J 148 See *Changaram* v *Raya* (1913) 7 L B R 86

[2] *Narayana Sah* v *Kannamma Bai* (1931) 55 Mad 727

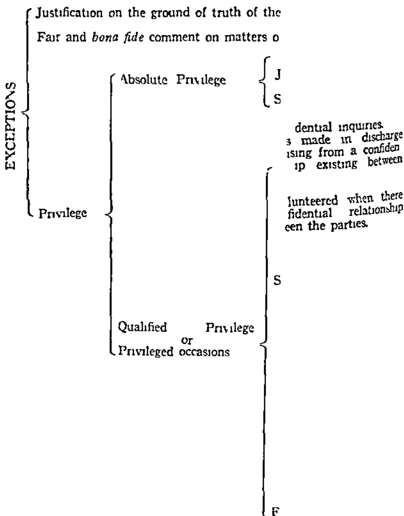
[3] *Hirabai* v *Dinshaw* (1926) 28 Bom L R 1334

[4] *Gaya Din Singh* v *Mahabir Singh* (1926) 1 Luck 386

[5] *Vallabha* v *Madusudanan* (1889) 12 Mad 495

[6] *Kaikhusru* v *Jehangir* (1890) 14 Bom 532 *Watkin* v *Hall* (1868) L R. 3 Q B 396 *Waithman* v *Weaver* (1822) 11 Price 257n See *Mi Ngwe Hmon* v *Mi Pua Su* (1913) 7 B L T 253

[7] Per Best C J in *De Crespigny* v *Wellesley* (1829) 5 Bing 392 401


EXCEPTIONS
Justification on the ground of truth of the
Fair and *bona fide* comment on matters o
Absolute Privilege
J
S
Privilege
dential inquiries.
s made in discharge
ising from a confiden
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lunteered when there
fidential relationship
een the parties.
S
Qualified Privilege
or
Privileged occasions
F

Where slanderous words are not actionable *per se* but damage arises from the repetition the originator will not be liable [1] except

(1) where the originator authorized or intended the repetition [2] or

(2) where the repetition was the natural and probable consequence of his act or

(3) where there was a moral obligation on the person in whose presence the slander was uttered to repeat it [3]

Repetition of a slander by a wife to her husband —Where the defendant imputed adultery to the plaintiff's wife in his absence and she voluntarily repeated the slander to her husband whereby he refused to cohabit with her it was held that no action was maintainable against the defendant [4]

EXCEPTIONS

1 JUSTIFICATION BY TRUTH

The truth of defamatory words is a complete defence to an action of libel or slander though it is not so in a criminal trial [5] Truth is an answer to the action not because it negatives the charge of malice but because it shows that the plaintiff is not entitled to recover damages For the law will not permit a man to recover damages in respect of an injury to a character which he either does not or ought not to possess [6] It would make no difference in law that the defendant had made a defamatory statement without any belief in its truth if it turned out afterwards to be true when made If the matter is true the purpose or motive with which it was published is irrelevant The defendant must show that the imputation made or repeated by him was true as a whole and in every material part thereof [7] But it is not necessary to justify every detail of the charge or general terms of abuse provided that the gist of the libel is proved to be in substance correct and that the details etc which are not justified produce no different effect on the mind of the reader than the actual truth would do [8] Thus, it is enough if the statement though not perfectly accurate is substantially true, e g a statement that the plaintiff was imprisoned for three weeks for travelling in a train without a ticket when in reality he was imprisoned for two weeks [9] If there is gross exaggeration the plea of justification will

[1] *Parkins* v *Scott* (1862) 1 H & C 153 *Watkin* v *Hall* (1868) L R 3 Q B 396
Ward v *Weeks* (1830) 7 Bing 211

[3] *Speight* v *Gosnay* (1891) 60 L J Q B 231 *Derry* v *Handley* (1867) 16 L T N S 263

[4] *Parkins* v *Scott* sup

[5] *Raghunath Damodhar* v *Janardhan Gopal* (1891) 15 Bom 599

[6] *M'Pherson* v *Daniels* (1829) 10 B & C 263 272

[7] *Weaver* v *Lloyd* (1824) 4 D & R 230 *Khair ud Din* v *Tara Singh* (1926) 7 Lah. 491

[8] Per Lord Denman in *Cooper* v *Lawson* (1838) 8 Ad & E 746 753

[9] *Alexander* v *N E Ry* (1865) 11 Jur N S 619

fail e g to say that a person has been suspended for extortion three times when he has been suspended only once[1] or to call an editor of a paper a felon editor when he was once convicted

If the statement is false it is no justification that the defendant honestly and on reasonable grounds believed it to be true

The maxim the greater the truth the greater the libel never had an application to civil actions for damages In criminal law truth is only a justification if it is shown that the publication was for the public good According to the Indian Penal Code it is not enough that the words complained of are true the defendant must then be prepared to go further and prove that not only are the words true but that al o it is for the public benefit that they should be published[3]

2 FAIR AND BONA FIDE COMMENT

The plea of fair comment does not arise if the plea of justification is made good[4]

A fair and *bona fide* comment on a matter of public interest is no libel[5] Thus legitimate criticism is no tort should loss ensue to the plaintiff, it would be *damnum sine injuria*[6]

Matters of public interest are —

(1) Affairs of State Public acts of ministers and officers of State can be commented on[7]

(2) The administration of justice[8]

(3) Public institutions and local authorities[9]

(4) Ecclesiastical matters[10]

(5) Books[11] pictures[1] and works of art

(6) Theatres[13] concerts and other public entertainments[14]

(7) Other appeals to the public e g a medical man bringing forward some new method of treatment and adverti ing

[1] *Clarkson* v *Lawson* (1829) 6 Bing 266
Leyman v *Latimer* (1877) 3 Ex D 15 on appeal (1878) *ib* 352

[3] See the authors Law of Crimes 14th Edn s 499 *Altaf Hossein* v *Tasud dook Hossein* (1867) 2 Agra 87

[4] Per Lord Loreburn in *Dakhyl* v *Labouchere* [1908] 2 K B 325*n* 327

[5] *Merivale* v *Carson* (1887) 20 Q B D 275

[6] *Ibid*

[7] *Watson* v *Walter* (1868) L R 4 Q B 73 *Davis* v *Shepstone* (1886) 11 App Cas 187 190

[8] *Lewis* v *Levy* (1858) E B & E 537 *Reg* v *O Dogherty* (1848) 5 Cox 348 *Woodgate* v *Ridout* (1865) 4 F & F 202 223

[9] *Purcell* v *Souler* (1877) 2 C P D 215 *Cox* v *Feeney* (1863) 4 F & F 13

[10] *Kelley* v *Tinling* (1865) L R 1 Q B 699

[11] *Strauss* v *Francis* (1866) 4 F & F 1107 *Fraser* v *Berkley* (1836) 7 C & P 621

[1] *Thompson* v *Shackell* (1828) Mood & Malk 187

[13] *Gregory* v *Duke of Brunswick* (1843) 1 C & K 24

[14] *Green* v *Chapman* (1837) 4 Bing N C 92 *Dibbin* v *Swan* (1793) 1 Esp 28

it[1] a man appealing to the public by writing letters to a newspaper

Comment in order to be fair must be based upon facts and if the defendant cannot show that his comments contain no misstatements of fact he cannot prove a defence of fair comment[3] Facts upon which the comment is founded must be truly stated though later they may not turn out to be true at all A fact may be truly stated and may yet be utterly untrue

A journalist does not transgress the limits of fair comment if all material facts are truly stated in the articles though it may be that there are one or two small deviations from absolute accuracy on minor points which have no influence on the conclusions and the conclusions are such as ought to be drawn from the premises by a critic bringing to his work the amount of care reason and judgment which is required of a journalist[4] But if the statement of fact is itself privileged the plea of fair comment is not excluded by the fact that the statement is erroneous[5]

The word fair embraces the meaning of honest and also of relevancy The view expressed must be honest and must be such as can fairly be called criticism[6] The word fair in the phrase a fair comment refers to the language employed and not to the mind of the writer Hence it is possible that a fair comment should yet be published maliciously[7] Mere exaggeration or even gross exaggeration would not make the comment unfair[8] But malice may negative fairness[9]

Every subject has a right to comment on those acts of public men which concern him as a subject of the realm if he does not make his

[1] *Morrison* v *Harmer* (1837) 3 Bing N C 759
[2] *Odger* v *Mortimer* (1873) 28 L T 472 *O Donoghue* v *Hussey* (1871) Ir R 5 C L 124 *Davis* v *Duncan* (1874) L R 9 C P 396
[3] *Digby* v *Financial News* [1907] 1 K B 502 507 *Peter Walker & Sons Ltd* v *Hodgson* [1909] 1 K B 239 256 See *Irwin* v *Reid* (1920) 48 Cal 304 *Subhas Chandra Bose* v *R Knight & Sons* (1928) 55 Cal 1121 *Raghunath Singh Parmar* v *Mukundi Lal* [1936] A L J R 1014
[4] *Surajmal* v *Horniman* (1917) 20 Bom. L R 185 *Union Benefit Guarantee Company* v *Thakorlal Thakor* (1935) 37 Bom L R 1033
[5] *Mangena* v *Wright* [1909] 2 K B 958
[6] *McQuire* v *Western Morning News* [1903] 2 K B 100 110 See *The Madras Times* v *Rogers* (1916) 30 M L J 294
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[9] *Thomas* v *Bradbury Agnew & Co Ltd* sup

commentary a cloak for malice and slander[1] Liberty of criticism must be allowed or we should neither have purity of taste nor of morals Fair discussion is essentially necessary to the truth of history and the advancement of science [2]

A writer in a public paper may comment on the conduct of a public man in the strongest terms but if he imputes dishonesty he must be prepared to justify it[3] The privilege does not extend to calumnious remarks on the private character of the individual[4] A newspaper has no privilege beyond any other member of the community in commenting on any matter of public interest When the words alleged to be defamatory allege or assume as true facts concerning the plaintiff which he denies and which either involve a slanderous imputation in themselves or upon which the comment bases imputations or inferences injurious to the plaintiff the defence of fair comment fails unless the comment is truthful in regard to its allegation or assumption of facts The defence cannot be sustained if the facts on which the comment purports to be made do not exist[5]

The plea in an action for libel that in so far as the words complained of consist of allegations of fact they are true in substance and in fact and in so far as they consist of expressions of opinion they are fair comments made in good faith and without malice on a matter of public interest is not a plea partly of justification and partly of fair comment but is a plea of fair comment only[6]

3 PRIVILEGE

The meaning of the word privilege is that a person stands in such a relation to the facts of the case that he is justified in saying or writing what would be slanderous or libellous in any one else

[1] *Parmiter* v *Coupland* (1840) 6 M & W 105 108 *Howard* v *Mull* (1866) 1 B H C App 85 91 *Lala Lajpat Rai* v *The Englishman* (1909) 13 C W N 895 (1910) 14 C W N 713

[2] Per Lord Ellenborough in *Tabart* v *Tipper* (1808) 1 Camp 350 351 352

[3] *Campbell* v *Spottiswoode* (1863) 3 B & S 769 32 L J Q B 185 196 199 *Joynt* v *Cycle Trading Publishing Co* [1904] 2 K B 292 *Hunt* v *Star Newspaper Co* [1908] 2 K B 309 320

[4] *Stuart* v *Lovell* (1817) 2 Stark 93 96 *Carr* v *Hood* (1808) 1 Camp 355n *Gathercole* v *Miall* (1846) 15 M & W 319 Writers in public papers must be careful as to the language they use while commenting on the proceedings of Courts of Justice and on matters of public interest they should be careful that they do not wantonly assail the character of others or impute criminality to them *Barrow* v *Hem Chunder Lahiri* (1908) 35 Cal 495 *The Englishman* v *Lala Lajpat Rai* (1910) 14 C W N 713 *Subhas Chandra Bose* v *R Knight & Sons* (1928) 55 Cal 1121

[5] *Subhas Chandra Bose* v *R Knight & Sons* sup

[6] *Sutherland* v *Stopes* [1925] A C 47 The defendant is entitled to give particulars of the facts upon which he based his comments, although those facts are defamatory of the plaintiff and there is no plea of justification *Burton* v *Board* [1928] 1 K B 301

[7] Folkard

Privilege is of two kinds (1) absolute and (2) qualified

(1) A statement is absolutely privileged when no action lies for it even though it is false and defamatory and made with express malice On certain occasions the interests of society require that a man should speak out his mind fully and frankly without thought or fear of consequences e g in Parliamentary proceedings or in the course of judicial military naval or State proceedings To such occasions therefore the law attaches an absolute privilege It is based upon the principle that interest of the community at large overrides the interest of the individual

(2) A statement is said to have a qualified privilege when no action lies for it even though it is false and defamatory unless the plaintiff proves express malice In certain matters the speaker is protected if there is absence of malice These are—(1) communications made (*a*) in the course of legal social or moral duty (*b*) for self protection (*c*) for protection of common interest (*d*) for public good and (2) reports of Parliamentary and judicial proceedings and proceedings in public meetings

Where the defendant sets up the plea that the publication had a qualified privilege the plaintiff must prove the existence of express malice which may be inferred either from the excessive language of the defamatory matter itself or from any facts which show that the defendant was actuated by spite or some indirect motive [1]

The distinctions between absolute and qualified privileges are—

(1) In the case of absolute privilege it is the occasion which is privileged and when once the nature of the occasion is shown it follows as a necessary inference that every communication on that occasion is protected But in the case of qualified privilege the defendant does not prove privilege until he has shown how that occasion was used It is not enough to have an interest or a duty in making a communication the interest or duty must be shown to exist in making the communication complained of [2]

(2) Even after a case of qualified privilege has been established it may be met by the plaintiff proving in reply actual malice on the part of the defendant [3] The cases of absolute privilege are protected in all circumstances independently of the presence of malice

[1] *Adam v Ward* (1917) A C 309 Per Dowse B in *Lynam v Gowing* (1880) L R 6 Ir 259 269 *Keshailal v Bai Girja* (1899) 1 Bom L R 478 24 Bom 13 *Ma Mya Shwe v Maung Maung* (1924) 2 Ran 333

[3] *Clark v Molyneux* (1887) 3 Q B D 237 *Jenoure v Delmege* [1891] A C 73 *Keshailal v* [illegible] sup *Moti Lal Raha v* [illegible] *Bannerjee* (1909) 36 Cal [illegible] *dianath Sastriar v* [illegible] *Thambiran* (1912) 24 [illegible] *Baba Gurdit Singh v* [illegible] *Ltd* (1935) 62 Cal 822

1 *Absolute privilege*

Occasions absolutely privileged may be grouped under four heads —

1 Parliamentary proceedings
2 Judicial proceedings
3 Military and Naval proceedings
4 State proceedings

1 PARLIAMENTARY PROCEEDINGS

Statements made by members of either House of Parliament in their places in the House though they might be untrue to their knowledge could not be made the foundation of civil or criminal proceedings however injurious they might be to the interest of a third person [1] But this privilege does not extend to anything said outside the walls of the House or to a speech printed and privately circulated outside the House For such a speech only a qualified privilege can be claimed [3]

A petition to Parliament is absolutely privileged [4]

Statements of witnesses before Parliamentary select committees of either House are also privileged [5]

Under the Parliamentary Papers Act 1840 [6] all report papers votes and proceedings ordered to be published by either House of Parliament are absolutely privileged At common law the order of the House of Commons for the publication and sale by booksellers of reports laid before the House did not exempt such booksellers from liability for any defamatory matter in any such report [7] The above statute was passed to alter the common law

2 JUDICIAL PROCEEDINGS

No action of libel or slander lies whether against Judges counsel witnesses or parties for words written or spoken in the course of any proceeding before any Court recognized by law and this though the words written or spoken were written or spoken maliciously without any justification or excuse and from personal ill will and anger against the person defamed [8] The ground of this rule is public policy It is applicable to all kinds of Courts of Justice but the doctrine has been carried further and it seems that this immunity applies wherever there is an authorized inquiry which though not before a Court

1 *Ex parte Wason* (1869) L R 4 Q B 573 576 *Dillon v Balfour* (1887) 20 Ir L. R. 600 *Lala Lajpat Rai v The Englishman* (1909) 13 C W N 895 See ss. 28 and 71 of the Government of India Act 1935

2 *R v Abingdon* (1794) 1 Esp 226

3 *Davison v Duncan* (1857) 7 E & B 229

4 *Lake v King* (1680) 1 Saund. 131*b*

5 *Goffin v Donnelly* (1881) 6 Q B D 307

6 3 & 4 Vic c 9

7 *Stockdale v Hansard* (1837) 2 Mood & Rob 9

8 *Royal Aquarium etc v Parkinson* [1892] 1 Q B 431 451

of Justice is before a tribunal which has similar attributes[1] e g milita tribunal[2] But it does not apply to Courts discharging administrati duties only e.g Court of Referee constituted under the Unemployme Insurance Act, 1920[3] Communications made to such Courts are n absolutely privileged In cases like these the defendant has a right qualified privilege and the onus is on him to prove the privilege[4]

All documents necessary to the conduct of a case such as pleading affidavits, and instructions to counsel are also absolutely privileged

Judge.—No action lies for words spoken by a Judge in the exerci of his judicial office although his motive is malicious and the wor are not spoken in the honest exercise of his office[5] Thus it is immateri whether the words were spoken without any reasonable or probable justifiable cause and without any foundation whatever and were whol irrelevant.[6] This doctrine has been applied not only to the Superi Courts, but to a Court of Record[8] to the Court of a Coroner and a Court martial which is not a Court of Record It is essential in a Courts that the Judges who are appointed to administer the law shou be permitted to administer it under the protection of the la independently and freely and without favour and without fear Th provision of the law is not for the protection or benefit of a maliciou or corrupt Judge, but for the benefit of the public, whose interest it that the Judges should be at liberty to exercise their functions wit independence and without fear of consequences How could a Judge exercise his office if he were daily and hourly in fear of an action bein brought against him and of having the question submitted to a jur whether a matter on which he had commented judicially was or wa not relevant to the case before him?[9]

The Madras[10] and the Allahabad[11] High Courts have followed th principle

[1] *Royal Aquarium etc v Parkinson* [1892] 1 Q B 431 442 451 followed in *Barrat v Kearns* [1905] 1 K B 504 e g a statement made befo e an officer exercising jurisdiction under the Madras Estates Land Act is absolutely privileged *Duraiswami Thevan v Lakshmanan Chettiar* (1932) 38 L W 240

[2] *Co-partnership Farms v Harvey Smith* [1918] 2 K B 405 *Gerhold v Baker* (1918) 35 T L R 102

[3] *Collins v Henry Whiteway & Co* [1927] 2 K B 378 See *O Connor v Waldron* [1934] A C 76 where the Commissioner performed certain administrative functions under a statute similar to a Court.

[4] *Bhairo Mahto v Rajkishore Singh* (1936) 17 P L T 816

[5] Per Lord Esher M R in *An derson v Gorrie* [1895] 1 Q B 66 671

[6] *Scott v Stansfield* (1868) L R. 3 Ex. 220

[7] That is, the House of Lord th Judicial Committee of the Priv Council the Court of Appeal th High Court of Justice and Courts o Nisi Prius and Assize

[8] *Tughan v Craig* [1918] 1 R. 245

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[10] *Raman Nayar v Subramanya* (1893) 17 Mad. 87

[11] *Jagannath Prasad v Rafat A Khan* [1934] A. L. J 1173 In thi case a Magistrate referred to th

1 Absolute privilege

Occasions absolutely privileged may be grouped under four heads —

1 Parliamentary proceedings.
2 Judicial proceedings
3 Military and Naval proceedings.
4 State proceedings

1 PARLIAMENTARY PROCEEDINGS

Statements made by members of either House of Parliament in their places in the House though they might be untrue to their knowledge could not be made the foundation of civil or criminal proceedings however injurious they might be to the interest of a third person[1] But this privilege does not extend to anything said outside the walls of the House or to a speech printed and privately circulated outside the House For such a speech only a qualified privilege can be claimed[3]

A petition to Parliament is absolutely privileged[4]

Statements of witnesses before Parliamentary select committees of either House are also privileged[5]

Under the Parliamentary Papers Act 1840[6] all reports paper votes and proceedings ordered to be published by either House of Parliament are absolutely privileged At common law the order of the House of Commons for the publication and sale by booksellers of reports laid before the House did not exempt such booksellers from liability for any defamatory matter in any such report[7] The above statute was passed to alter the common law

2 JUDICIAL PROCEEDINGS

No action of libel or slander lies whether against Judges counsel witnesses or parties for words written or spoken in the course of any proceeding before any Court recognized by law and this though the words written or spoken were written or spoken maliciously without any justification or excuse and from personal ill will and anger against the person defamed[8] The ground of this rule is public policy It is applicable to all kinds of Courts of Justice but the doctrine has been carried further and it seems that this immunity applies wherever there is an authorized inquiry which though not before a Court

[1] *Ex parte Wason* (1869) L R 4 Q B 573 576 *Dillon* v *Balfour* (1887) 20 Ir L. R. 600 *Lala Lajpat Rai* v *The Englishman* (1909) 13 C W N 895 See ss. 28 and 71 of the Government of India Act 1935

[2] *R* v *Abingdon* (1794) 1 Esp 226

[3] *Davison* v *Duncan* (1857) 7 E & B 229

[4] *Lake* v *King* (1680) 1 Saund. 131*b*

[5] *Goffin* v *Donnelly* (1881) 6 Q B D 307

[6] 3 & 4 Vic c 9

[7] *Stockdale* v *Hansard* (1837) 2 Mood & Rob 9

[8] *Royal Aquarium etc* v *Parkinson* [1892] 1 Q B 431 451

of Justice is before a tribunal which has similar attributes [1] e g military tribunal [2] But it does not apply to Courts discharging administrative duties only e g Court of Referee constituted under the Unemployment Insurance Act 1920 [3] Communications made to such Courts are not absolutely privileged In cases like these the defendant has a right of qualified privilege and the onus is on him to prove the privilege [4]

All documents necessary to the conduct of a case such as pleadings affidavits, and instructions to counsel are also absolutely privileged

Judge —No action lies for words spoken by a Judge in the exercise of his judicial office although his motive is malicious and the words *are not spoken in the honest exercise of his office* Thus *it is immaterial* whether the words were spoken without any reasonable or probable or justifiable cause and without any foundation whatever and were wholly irrelevant [6] This doctrine has been applied not only to the Superior Courts but to a Court of Record [8] to the Court of a Coroner and to a Court martial which is not a Court of Record It is essential in all Courts that the Judges who are appointed to administer the law should be permitted to administer it under the protection of the law independently and freely and without favour and without fear This provision of the law is not for the protection or benefit of a malicious or corrupt Judge but for the benefit of the public whose interest it is that the Judges should be at liberty to exercise their functions with independence and *without fear of consequences How could a Judge so* exercise his office if he were daily and hourly in fear of an action being brought against him and of having the question submitted to a jury whether a matter on which he had commented judicially was or was not relevant to the case before him [7,9]

The Madras[10] and the Allahabad[11] High Courts have followed this principle

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[10] *Raman Nayar* v *Subramanya* (1893) 17 Mad 87

[11] *Jagannath Prasad* v *Rafat Ali Khan* [1934] A. L. J 1173 In this case a Magistrate referred to the

Want of jurisdiction—If a Judge goes beyond his jurisdiction a different set of considerations arises The only difference between Judges of the Superior Courts and other Judges consists in the extent of their respective jurisdiction[1] A Judge of an inferior Court is answerable in an action for an act done by his command when he has no jurisdiction and is not misinformed as to the acts on which jurisdiction depends[2] But unless he knows or has the means of knowing of the defect of jurisdiction no action lies[3]

Magistrate—A Magistrate when sitting in the course of his judicial duties is a Judge and is entitled to the same immunity[4]

Coroner—A Coroner holding an inquest is not liable to an action for words falsely and maliciously spoken by him in his address to the jury[5]

Receiver—The official receiver has a statutory duty to inquire in a judicial way into certain matters and in performing that duty he is acting in a judicial capacity The report made by such an officer is absolutely privileged[6]

Juror—Every observation of a juror is absolutely privileged if connected with the matter in issue[7] so is any presentment by a grand jury[8]

Advocate—No action lies against an advocate for defamatory word spoken with reference to and in the course of an inquiry before a judicial tribunal although they are uttered by the advocate maliciously and not with the object of supporting the case of his client and are uttered without any justification or even excuse and from personal ill will or anger towards the person defamed arising out of a previously existing cause and are irrelevant to every issue of fact which is contested before the tribunal[9]

The reason of the rule is that a counsel who is not malicious and who is acting *bona fide* may not be in danger of having actions brought against him If the rule of law were otherwise the most innocent of counsel might be unrighteously harassed with suits and therefore it is better to make the rule of law so large that an innocent counsel shall never be troubled although by making it so large counsel are included

plaintiff when he was in the witness-box as dishonest liar and foolish

[1] Per Lord Esher M R in *Anderson* v *Gorrie* [1895] 1 Q B 668 671

Houlden v *Smith* (1850) 14 Q B 841

[3] *Calder* v *Halket* (1839) 3 Moor P C 28

[4] *Law* v *Llewellyn* [1906] 1 K B 487 See *Kirby* v *Simpson* (1854) 10 Ex 358

[5] *Thomas* v *Churton* (1862) 2 B & S 475 *Yates* v *Lansing* (1772) 5 Johns. 283

[6] *Bottomley* v *Brougham* [1908] 1 K B 584

[7] *R* v *Skinner* (1772) Lofft 55

[8] *Little* v *Pomeroy* (1873) Ir R 7 C L 50

[9] *Munster* v *Lamb* (1883) 11 Q B D 588

who have been guilty of malice and misconduct [1]

Counsel's words are absolutely privileged although he may have exceeded his instructions

Indian law—The Madras High Court has laid down that an advocate cannot be proceeded against either civilly or criminally for words uttered in his office as advocate [3] He has according to the Bombay High Court fullest liberty of speech in the course of a trial before a judicial tribunal so long as his language is justified by his instructions or by the evidence or by the proceedings on the record The mere fact that his words are defamatory or that they are calculated to hurt the feelings of another or that they ultimately turn out to be absolutely devoid of all solid foundation would not make him responsible nor render him liable in any civil or criminal proceeding [4] The Patna High Court has adopted the same view as the Madras and Bombay High Courts [5] The Allahabad High Court has held that if a pleader makes a defamatory remark during the examination of a witness by the opponent's pleader which is entirely uncalled for and cannot be regarded as being either in furtherance of the interests of his client or in the discharge of his professional duty towards his client he will be liable.[6]

Solicitors—Solicitors acting as advocates have the same privilege as counsel [7]

Party—Defamatory statements by a party in open Court conducting his own cause are also absolutely privileged and no action will lie no matter how false or malicious or irrelevant to the matter in issue the words complained of may have been [8] The privilege of parties is confined to what they do or say in the conduct of the case [9]

Indian law—The Madras High Court has applied the rule of absolute immunity to an accused person in respect of questions put by him in good faith for the purpose of defending himself [10] The Calcutta High Court in a full bench case does not expressly decide this point but lays down that there is a large preponderance of judicial opinion in favour of the view that the principles of justice equity and good conscience applicable in such circumstances should be identical with the

[1] Per Brett M R in *Munster v Lamb* (1883) 11 Q B D 588 604

[2] *Armstrong v Kiernan* (1855) 5 Ir C L R 171

[3] *Sullivan v Norton* (1886) 10 Mad. 28 F B See *Shiva Kumari Devi v Becharam Lahiri* (1921) 25 C W N 835

[4] *Bhaishanker v Wadia* (1899) 2 Bom L R 3 F B

[5] *Maharaj Kumar Jagat Mohan v Kalipada Ghosh* (1922) 1 Pat. 371

[6] *Rahim Baksh v Bachcha Lal* (1928) 51 All. 509

[7] *Mackay v Ford* (1860) 5 H & N 792

[8] *Royal Aquarium &c v Parkinson* [1892] 1 Q B 431 451 *Hodgson v Scarlett* (1818) 1 B & Ald. 232 244

[9] *Seaman v Netherclift* (1876) 1 C P D 540 545

[10] *Pachaiperumal Chettiar v Dasi Thangam* (1908) 31 Mad 400

corresponding relevant rules of the common law of England and that a small minority favours the view that the principles of justice equity and good conscience should be identical with the rules embodied in the Indian Penal Code[1]

The Lahore High Court has laid down that a remark made by a party to a suit wholly irrelevant to the matter of inquiry and uncalled for by any question of the Court is not privileged[2]

Witness—No action lies against a witness for what he says or writes in giving evidence before a Court of Justice[3] The rule is based on public policy which requires that witnesses should give their testimony free from any fear of being harassed by an action on an allegation whether true or false that they acted from malice The preliminary examination of a witness by a solicitor in preparing the proof for trial is within the same privilege as that which he would have if he had said the same thing in his sworn testimony in Court[4]

Indian law—The Privy Council has decided that witnesses cannot be sued in a civil Court for damages in respect of evidence given by them upon oath in a judicial proceeding The ground of this principle is that it concerns the public and the administration of justice that witnesses giving their evidence on oath in a Court of Justice should not have before their eyes the fear of being harassed by suits for damages but that the only penalty which they should incur if they give evidence falsely should be an indictment for perjury[5]

Similarly the Bombay High Court has held that no action lies against a witness in respect of words spoken by him in the witness box although they are false[6] A criminal prosecution will lie for perjury if the evidence given is intentionally false

The Calcutta and the Allahabad High Courts and the former Chief Court of the Punjab laid down that statements made by witnesses are protected only if they are relevant to the inquiry[7] The Madras High

[1] *Satis Chandra Chakravarti* v *Ram Dayal De* (1920) 48 Cal 388 F B

[2] *Jiwan Mal* v *Lachhman Dass* (1926) 8 L L J 150 27 P L R 351

[3] *Dawkins* v *Lord Rokeby* (1875) L R 7 H L 744 *Seaman* v *Netherclift* (1876) 1 C P D 540 545

[4] *Watson* v *M'Ewan* *Watson* v *Jones* [1905] A C 480 Statements made by a potential witness as a preliminary to going into the witness-box are privileged *Sanjivi Reddy* v *Koneri Reddi* (1925) 49 Mad. 315 Statements made to a police-officer with a view to their being repeated before the Magistrate are privileged *ibid*

[5] *Baboo Gunnesh Dutt Singh* v *Mugneeram* (1872) 11 Beng L R 321 P C *Chidambara* v *Thirumani* (1886) 10 Mad. 87 *Nathji* v *Lalbhai* (1889) 14 Bom 97

[6] *Templeton* v *Laurie* (1900) 2 Bom L R 244 25 Bom 230

[7] *Bhikumber Singh* v *Becharam* (1888) 15 Cal 264 *Girwar Singh* v *Siraman Singh* (1905) 32 Cal. 1060 *Dawan Singh* v *Mahip Singh* (1888) 10 All 425 *Tulshi Ram* v *Harbans* (1885) 5 A W N 301 *Babu Prasad* v *Muda Mal* (1913) 11 A L J 193 *Mohun Lall* v *Levinge* (1868) P R. No 39 of 1868

Court has also held that the statements made by a witness are entitled not to an absolute but only to a qualified privilege[1]

No action lies against a person for what he states in answer to questions put to him by a police-officer conducting an investigation under the provisions of the Criminal Procedure Code[2]

Affidavits pleadings, etc —No action lies against a man for a statement made by him in an affidavit in the course of a judicial proceeding, even though it be alleged to have been made falsely and maliciously and without any reasonable or probable cause[3] The same principle applies even though the person scandalized is not a party to the cause.[4] But this privilege does not extend to affidavits containing scandalous matter The Court may order scandalous matter in an affidavit to be expunged[5]

No action for libel lies for any statement in the pleadings[7]

Indian law —The Bombay[8] Madras and Allahabad High Courts have laid down that no action for libel lies for any statement in pleadings There is no difference between evidence given in the box and the evidence on affidavit in that they are both absolutely privileged[9] Similarly a defamatory statement in a complaint to a Magistrate[10] or a petition to a Magistrate to take action under s 107 Criminal Procedure Code[11] is absolutely privileged A person presenting a petition to a criminal Court is not liable in a civil suit for damages in respect of statements made there

Ali Khan v *Malik Yaran Khan* (1879) P R No 16 of 1879 *Kundan* v *Ramji Das* (1879) P R. No 146 of 1879

[1] *Pedadabba Reddi* v *Varada Reddi* (1928) 52 Mad 432 dissenting from *Manjaya* v *Sesha Setti* (1888) 11 Mad 477 decided under the Penal Code

[2] *Methuram* v *Jaggannath* (1901) 28 Cal. 794 The former Chief Court of Lower Burma held that where the investigation by the police was not into an offence absolute privilege could not be claimed Statements made in answer to questions asked by a police officer making general inquiries as to the names of bad characters with a view to ultimate action under the preventive sections of the Code of Criminal Procedure are privileged but not absolutely privileged *Lu Gale* v *Po Thein* (1912) 7 L B R 64

[3] *Revis* v *Smith* (1856) 18 C B 126

[4] *Henderson* v *Broomhead* (1859) 4 H & N 569

[5] *R* v *Salisbury* (1699) 1 Ld Raym 341

[6] *Christie* v *Christie* (1873) L R 8 Ch 499

[7] *MacCabe* v *Joynt* [1901] 2 I R 115

[8] *Nathji* v *Lalbhai* (1899) 14 Bom 97 In this case the application containing defamatory matter was made with the object of having other persons joined as parties to the suit.

[9] *Adivaramma* v *Ramachandra* (1911) 21 M L J 85 [1910] M W N 155 See also the observations of the same High Court in *Hinde* v *Baudry* (1876) 2 Mad 13

[10] *Re Muthusami Naidu* (1912) 37 Mad. 110 *Ramkirat Kamkar* v *Bisesuar Nath* (1932) 11 Pat. 693 The former Judicial Commissioner's Court of Upper Burma held likewise *Maung Myo* v *Maung Kywet E* (1918) 3 U B R (1917 1920) 88.

[11] *Sanjivi Reddy* v *Koneri Reddi* (1925) 49 Mad 315 Repetition of the statement contained in the petition before a police-officer to whom the Magistrate referred the complaint for inquiry and report is also absolutely privileged *ibid*

in which may be defamatory of the person complained against [1] Such statements are absolutely privileged [2] The Rangoon High Court has held likewise.[3]

The Calcutta High Court however is of opinion that a defamatory statement made in pleadings is not absolutely privileged [4] If a statement in an affidavit is wholly irrelevant to the inquiry to which the affidavit related the person making it would be liable for defamation [5]

3 MILITARY AND NAVAL PROCEEDINGS

Proceedings of naval and military tribunals are absolutely privileged Statements made before a naval or military Court of Inquiry by a military man are protected [6] Reports made in the course of military or naval duty such as adverse opinions expressed by one officer of the con duct of another are absolutely privileged even if made maliciously and without reasonable or probable cause [7]

4 STATE PROCEEDINGS

For reasons of public policy absolute protection is given to every communication relating to State matters made by one minister to another or to the Crown [8] It is not competent to a civil Court to inquire whether or not he acted maliciously in making it [9] A report by the High Commis sioner of Australia in the United Kingdom to the Prime Minister of Australia is absolutely privileged [10] A communication may be absolutely privileged as an act of State although it relates to commercial matters [11]

There is a difference of opinion whether an official publication e.g. a Government Resolution, is absolutely privileged or enjoys merely a qualified privilege [12] According to the Madras High Court it is absolutely

[1] *Chunni Lal* v *Narsingh Da* (1917) 40 All 341 F B overruling *Abdul Hakim* v *Tej Chandar* (1881) 3 All 815

[2] *Ramkirat Kamkar* v *Biseswar Nath* (1932) 11 Pat. 693

[3] *Ma Mya Shwe* v *Maung Maung* (1921) 2 Ran 333

[4] *Augada Ram* v *Nemai Chand* (1896) 23 Cal 867 *Sandyal* v *Bhaba Sundari Debi* (1910) 15 C W N 995 14 C L J 31 *Shibnath* v *Sat Cowree Deb* (1865) 3 W R 198 In a later case however though the point was not necessary for deci sion Mookerjee J said that in civil suits parties ought to enjoy the same absolute privilege as under the English law Beachcroft J expressed *contra* *Crowdy* v *Reilly* (1912) 17 C. W N 554 17 C L. J 105 See also *Golap Jan* v *Bholanath Khettry* (1911) 38 Cal 880

[5] *Giribala Dassi* v *Pran Krishto Ghosh* (1903) 8 C W N 292

In Oudh the view of the Calcutta High Court is followed *Dalpat Singh* v *Amarpal Singh* (1918) 21 O C. 321

[6] *Dawkins* v *Lord Rokeby* (1875) L R. 7 H L 744 *Co partnership Farms* v *Harvey Smith* [1918] 2 K B 405

[7] *Dawkins* v *Lord Paulet* (1869) L. R 5 Q B 94

[8] *Chatterton* v *The Secretary of State* [1895] 2 Q B 189 194 *Stace* v *Griffith* (1869) L. R 2 P C 420

[9] *Chatterton* v *The Secretary of State* ibid

[10] *M Isaacs & Son Ltd* v *Cook* [1925] 2 K B 391

[11] *Ibid*

[12] *Jehangir Manekji* v *The Secre tary of State* (1902) 5 Bom L. R 30 (1903) 6 Bom. L R 131

privileged [1]

Communications relating to State matters are not confined to cases where the Secretaries of State or Under Secretaries of State are communicating with one another State matters mean public matters particularly matters connected with the administration of justice and a State officer must include a public officer whose duty it is to make enquiries and investigations into allegations of commission of criminal offences Report made by a police officer to a Magistrate under s 202 Criminal Procedure Code falls within the category of State matters and is absolutely privileged

II *Qualified privilege*

The law presumes or implies malice in all cases of defamatory words this presumption may be rebutted by showing that the words were uttered on a privileged occasion A privileged occasion is an occasion where the person who makes a communication has an interest or a duty legal social or moral to make it to the person to whom it is made and the person to whom it is so made has a corresponding interest or duty to receive it This reciprocity is essential

The defendant has to prove that the occasion is privileged If the defendant proves it the burden of showing actual malice or malice in fact is cast upon the plaintiff but unless the defendant does so the plaintiff is not called upon to prove actual malice [4] To prove malice extrinsic evidence of malice is not necessary The words of the libel and the circumstances attending its publication may themselves afford evidence of malice

The following are the cases of qualified privilege —

1 When circumstances are such as to cast on the defendant the duty of making the communication to a third party [5]

2 Communications made in self defence

3 When the defendant has an interest in making the communication to the third person and the third person has a corresponding interest in receiving it [7]

4 Communications made to persons in public position for public good

5 Fair and impartial reports of proceedings—

[1] *Ross* v *The Secretary of State for India* (1913) 37 Mad 55 *Beni Madho Prasad* v *Ward and Ah* [1937] All 390

[3] *Adam* v *Ward* [1917] A C 309 334

[4] *Hebditch* v *MacIlwaine* [1894] 2 Q B 54 *Stuart* v *Bell* [1891] 2 Q B 341 *Clark* v *Molyneux* (1877) 3 Q B D 237 *Royal Aquarium &c* v *Parkinson* [1892] 1 Q B 431 434 *Dickson* v *Earl of Wilton* (1859) 1 F & F 419 *Jackson* v *Hopperton* (1864) 16 C B N S 829

[5] *Mati Lal Raha* v *Indra Nath Bannerjee* (1909) 36 Cal 907

[6] *Pullman* v *Hill & Co* [1891] 1 Q B 524 530

[7] *Pullman* v *Hill & Co* ibid *Hunt* v *G* *N* *Ry* [1891] 2 Q B 189 191

(a) in Parliament or

(b) in any Court of Justice or

(c) in any public meeting or meeting of certain public bodies and persons specified in s 4 of the Law of Libel Amendment Act 1888

I DUTY

A communication injurious to the character of another made *bona fide* from a sense of duty legal moral or social and reasonably necessary for the due discharge of such duty and made with a belief in its truth is privileged [1] There must in fact be an interest or duty in the person to whom the libel is published It is not sufficient that the maker of the statement honestly and reasonably believes that the person to whom it is made has such an interest or duty [2] The person making it must also have an interest in the matter communicated [3]

Such communications are protected for the common convenience and welfare of society [4]

1 *Legal duty*

A public officer may send to his superior a report pertinent to a matter which it is his duty to investigate even though the report contains defamatory statements regarding an individual Such a report is confidential and is privileged [5] The mere fact that the superior officer never asked his opinion with regard to the subject of the communication does not destroy the privilege [6] Similarly an order containing defamatory statements regarding a person sent by a superior officer to his subordinate officer in the course of his official duty is privileged [7]

2 *Social or moral duty*

Communications made in pursuance of a duty owed to society relate to—

(1) Character of servants
(2) Confidential communications of a private nature
(3) Information as to crime or misconduct of others

(1) *Character of servants*

Character is given to a servant for his benefit as well as for the benefit of the public If the master wantonly and capriciously volunteers to make

[1] *Dawkins* v *Lord Paulet* (1869) L R. 5 Q B 94 102 *Harrison* v *Bush* (1855) 5 El & B 344 Report made by Municipal members in respect of the conduct of a Municipal employee was held to be made on a privileged occasion *Prem Narain* v *Jagdamba Sahai* (1925) 47 All 859

[2] *Hebditch* v *MacIlwaine* [1894] 2 Q B 54 *Adam* v *Ward* [1917] A C 309

[3] *Watt* v *Longsdon* [1930] 1 K. B 130

[4] *Toogood* v *Spyring* (1834) 1 Cr M & R 181 193

[5] *Thomas* v *Simmonds* (1898) 4 Burma L. R 152 *Jusab Thana* v *Morrison* (1912) 15 Bom. L. R 249

[6] *Narasimha Shankar* v *Balwant Lakshman* (1903) 5 Bom L R 664 27 Bom. 585

[7] *Govindan Nair* v *Achutha Menon* (1915) 39 Mad 433

a statement injurious to the servant or makes such statement out of malice the statement is not privileged [1] If bad character is deserved the master is not liable.[2]

(2) *Confidential communications of a private nature*

Confidential communications of a private nature are—

(*a*) Answers to confidential inquiries

(*b*) Communications made in discharge of a duty arising from a confidential relationship existing between the parties

(*c*) Information volunteered when there is no confidential relationship existing between the parties

(*a*) Answers to confidential inquiries—If a person who is thinking of dealing with another in any matter of business asks a question about his character from some one who has means of knowledge it is for the interests of society that the question should be answered and if answered *bona fide* and without malice, the answer is a privileged communication If a person carrying on the business of obtaining information regarding the character of other persons and selling such information for profit communicates information injurious to the plaintiff he will be liable [4]

(*b*) Communications made in cases of confidential relationship — Such a confidential relationship exists for instance between husband and wife father and son guardian and ward [6] master and servant [7] principal and agent solicitor and client [8] partners or even intimate friends [9] In these cases there exists between the parties such a confidential relation as to throw on the defendant the duty of protecting the interest of the persons concerned But the House of Lords have doubted whether the privilege arising from the relation of solicitor and client affords an absolute protection to the solicitor despite the subsequent waiver by the client [10] The privilege

[1] *Gardner* v *Slade* (1849) 13 Q B 796 *Rogers* v *Clifton* (1803) 3 B & P 587 *Toogood* v *Spyring* (1834) 1 Cr M & R 181

Weatherston v *Hawkins* (1786) 1 T R 110 *Somerville* v *Hawkins* (1851) 10 C B 583 *Dixon* v *Parsons* (1858) 1 F & F 24

Waller v *Loch* (1881) 7 Q B D 619 622 See *Beatson* v *Skene* (1860) 29 L J Ex 430 *Cowles* v *Potts* (1865) 34 L J Q B 247 *London Assn for Protection of Trade* v *Greenlands Ltd* [1916] 2 A C 15

[4] *Macintosh* v *Dun* [1908] A C 390

Peacock v *Reynal* (1612) 2 B & G 151

[6] *Aberdein* v *Macleay* (1893) 9 T L R 539

Scarll v *Dixon* (1864) 4 F & F 250 *Mead* v *Hughes* (1891) 7 T L R 291 *Boxsius* v *Goblet Freres* [1894] 1 Q B 842 *Baker* v *Carrick* [1894] 1 Q B 838 *Edmondson* v *Birch & Co* [1907] 1 K B 371 See *Leishman* v *Holland* (1890) 14 Mad 51 *Mills* v *Mitchell* (1865) Bourke 18

[8] *Wright* v *Woodgate* (1835) 2 Cr M & R 573

[9] A communication from a clergyman in charge of a mission to a lady attached to his staff intimating his disapproval of her proposed marriage and containing imputations affecting the moral character of the person whom she was about to marry is held to be a privileged communication and not actionable unless malice is shown X v Z (1908) P R No 83 of 1908

[10] *Minter* v *Priest* [1930] A C 558

of solicitor and client has been generally dealt with as qualified privilege[1] A confidential communication between a solicitor and client comes under qualified privilege because the communication is supposed to have been made in the protection of self interest or by reason of common interest existing between the party communicating and the party communicated to But where a communication is made to a solicitor in connection with a judicial proceeding or in connection with a necessary step preliminary thereto or with reference to an act incidental to the proper initiation thereto the communication is absolutely privileged[2]

(c) Volunteered information —Where a person is so situated that it becomes right in the interests of society that he should tell to a third person certain facts then if he *bona fide* and without malice does tell them it is a privileged communication[3] e g communication by the secretary of a charity organization society to a stranger as to the deserts of an applicant to such stranger for charity[4] or publication of the minutes of a Medical Council that a certain practitioner is guilty of infamous conduct[5] or communication by a member of a caste to a meeting of the caste[6] or communication of a resolution by a secretary[7] or headman[8] of a caste to members of the caste or by the secretary of one section of a caste to secretaries of other sections of the caste[9] or publication of the decision of the stewards of a Jockey club in the *Racing Calendar* that a trainer was warned off a particular race because a horse trained by him was doped but not in any other newspaper[10] The Privy Council held in *Gobind Das's*[11] case that the occasion of the publication of such a resolution was privileged even if the resolution had been

[1] Per Viscount Dunedin in *Minter v Priest* [1930] A C 558 The case of *More v Weaver* [1928] 2 K B 520 which laid down that communication between a solicitor and client is absolutely privileged requires reconsideration

[2] *Lilley v Roney* (1892) 61 L J Q B 727 *Bottomley v Brougham* [1908] 1 K B 584 588 589 Followed in *Balammal v Palandi Naidu* (1937) 46 L W 932 [1937] M W N 1108 where the defendant's vakil wrote a letter to the plaintiffs containing a malicious defamatory statement concerning the plaintiffs, viz Your daughter ran away with one M from her husband clandestinely and was staying with him for two days.

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passed under circumstances which rendered it irregular (though it was not so in that particular case) Where a libellous communication is made regarding a member of a caste the mere fact that the person making such communication is a member of the caste will not of itself suffice to make the communication privileged [1]

A communication by a public servant of a matter within his own province concerning the conduct of a person who is for the time taking a public part the matter being one of public interest as to which the public are entitled to information may be a privileged communication on the part of that public servant and if sent by him to a newspaper and published therein it may also be the subject of privilege in the proprietor of the newspaper as that is the ordinary channel by means of which the communication can be made public

(3) *Information as to crime or misconduct of others*

When it comes to the knowledge of any one that a crime has been committed a duty is laid on that person as a citizen of the country to state to the authorities what he knows respecting the commission of the crime and if he states only what he knows and honestly believes he cannot be subjected to an action for damages merely because it turns out that the person as to whom he has given the information is after all not guilty of the crime [3] Under the Criminal Procedure Code (Act V of 1898) a duty is cast on every person to give information of the commission of certain offences to the nearest Magistrate or police officer (s 44)

II COMMUNICATIONS MADE IN SELF PROTECTION

1 *Statements necessary to protect defendant s private interests*

A statement made by a person in the conduct of his own affairs in matters where his interest is concerned is privileged [4]

Any one, in the transaction of business with another has a right to use language *bona fide* which is relevant to that business and which a due regard to his own interest makes necessary even if it should directly or by its consequences be injurious or painful to another [5]

The defendants in a printed monthly circular issued to their servants stated they had dismissed the plaintiff for gross neglect of duty It was held that the occasion was privileged in the absence of malice or abuse of authority as it was

[1] *Coopoosami Chetty* v *Duraisami Chetty* (1909) 33 Mad. 67

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clearly to the interest of the defendants that their servants should know that gross misconduct would be followed by dismissal[1]

Statements made in petitions—In an action to recover damages for defamation brought by the manager of a *pardanashin* Mahomedan lady who had in a petition to the Munsif represented that she had discharged him from her service, because he had not managed her properties truthfully and correctly but had acted corruptly and fraudulently it was held that the defendant had reasonable grounds for making the statement and that in the absence of evidence of malice, she was not liable[2]

2 *Statements provoked by plaintiff*

A man has a right to defend his character against false aspersions If the defendant makes any statement *bona fide* in answer to the attack made on him by the plaintiff and for the sole purpose of defending himself from such an attack then the occasion is privileged[3] But the statement must not be false or irrelevant[4]

The privilege may be lost if the extent of publication is excessive e g in a matter of purely local or private importance it is not necessary to write to the *Times* or to advertise In such a case the extent given to the announcement is evidence of malice But where the plaintiff has previously attacked the defendant in newspapers[6] or in public and the latter retaliates by publishing in the papers in self defence a statement of the case from his point of view and in so doing makes a defamatory statement concerning the plaintiff such statement is privileged if made *bona fide*

3 *Statements invited by plaintiff*

A letter written by the defendant as an answer to a letter sent by the plaintiff with an intention of obtaining such an answer is not action

[1] *Hunt* v *G N Ry* [1891] 2 Q B 189

[2] *Shaik Ameenooddeen* v *Bibee Khyroonnissa* (1873) 20 W R 60 *Mirza Ekhal Bahadoor* v *Solano* (1865) 2 W R 163 *Venkata Narasimha* v *Kotayya* (1889) 12 Mad 374

[3] *O Donoghue* v *Hussey* (1871) Ir R 5 C L 124 *Coward* v *Wellington* (1836) 7 C & P 531 535 *Amrita Nath* v *Abhoy Charan* (1901) 32 Cal 318

[4] *Amrita Nath* v *Abhoy Charan* ibid

Capital & Counties Bank v *Henty & Sons* (1882) 7 App Cas 741 At a heated quarrel at an election meeting plaintiff called the defendant a rowdy and a suspect and the defendant retorted by saying that the plaintiff was a drunkard After the election the defendant repeated that the plaintiff was a drunkard It was held that the defendant was not liable for the use of the word at the meeting but liable for subsequent use of it *Subbarayudu* v *Sreenivasa Charyulu* (1926) 52 M L J 87

Coward v *Wellington* sup

[7] *Laughton* v *Bishop of Sodor and Man* (1872) L R 4 P C 495 *Koenig* v *Ritchie* (1862) 3 F & F 413 *R* v *Veley* (1867) 4 F & F 1117 See *The Englishman Ltd* v *The Hon'ble Antonio Arrnabere* (1930) 35 C W N 271 52 C L J 315 where the plaintiff's complaint about an interview was published along with the editor's note as to the reliability of the reporter who took the interview

able even if it contains defamatory statements[1]

III PROTECTION OF COMMON INTEREST

Every communication made *bona fide* upon any subject matter in which the party communicating has an interest is privileged if made to a person having a corresponding interest[2] or to a person honestly believed to have a duty to protect that interest[3] But the privilege will be lost if the statement is made to an unnecessarily large number of persons and thus spread broadcast[4]

A communication made *bona fide* to a lady by her son in law[5] or by her brother[6] *as to the character of her intended husband* a letter written by a solicitor on behalf of his client to a third person[7] a letter written by the husband to the relation of his divorced wife explaining his conduct[8] are privileged communications made in the protection of common interest

One B the foreign manager of a company which carried on business abroad wrote to the defendant who was a director of the company in England a letter containing gross charges of immorality drunkenness and dishonesty on the part of the plaintiff who was the managing director of the company abroad Without obtaining any corroboration of the allegation in B s letter and without communicating with the plaintiff the defendant showed B s letter to the chairman of the board of directors and then to the plaintiff s wife who was an old friend of his. The allegations in B s letter were unfounded, but the defendant believed them to be true It was held that the publication to the chairman was made upon a privileged occasion but that the publication to the plaintiff s wife was not so[9]

IV COMMUNICATIONS MADE TO PERSONS IN PUBLIC POSITION

Such communications must be for public good Information given for the purpose of redressing grievances or securing public morals is privileged for instance a complaint to the Home Secretary about a Magistrate,[10] or to the Postmaster General about a postmaster[11] or to a Bishop about a clergyman[12] *The person to whom the information is*

[1] *King* v *Waring* (1803) 5 Esp 13

[2] *Harrison* v *Bush* (1855) 5 E & B 344 *Watt* v *Longsdon* [1930] 1 K B 130 *Venkata* v *Kotayya* (1889) 12 Mad 374 *Mati Lal Raha* v *Indra Nath Bannerjee* (1909) 36 Cal 907

[3] *Ravunni Menon* v *Neelakandan Nambudri* [1934] M W N 345

[4] *Duncombe* v *Daniell* (1837) 8 C & P 222

[5] *Todd* v *Hawkins* (1837) 8 C & P 88

[6] *Adams* v *Coleridge* (1884) 1 T L R 84

[7] *Quartz Hill Consolidated Gold Mining Co* v *Beall* (1882) 20 Ch D 501 509 *Baker* v *Garrick* [1894] 1 Q B 838 If such letter contains a statement of independent and extraneous matter unconnected with and not relevant to the purposes of the letter the privilege will be lost *M Keogh* v *O Brien Moran* [1927] I R 348

[8] *Bodycote* v *McMorran* (1898) 4 Burma L R 212

[9] *Watt* v *Longsdon* sup

[10] *Harrison* v *Bush* (1855) 5 E & B 344

[11] *Woodward* v *Lander* (1834) 6 C & P 548

[12] *Jones* v *Boston* (1845) 2 C & K 4

given must be competent to deal with the subject matter [1] otherwise there can be no privilege [2]

V FAIR REPORTS

Fair reports of (1) judicial proceedings (2) Parliamentary proceedings (3) quasi judicial proceedings and (4) proceedings in public meetings are treated as privileged communications

1 *Judicial proceedings*

A fair substantial, *bona fide* impartial and correct report of proceeding *in any Court of Justice is privileged except where the matters given* in evidence are (1) of a grossly scandalous blasphemous seditious or immoral tendency [3] or (2) expressly prohibited by the order of the Court [4] or (3) by statute [5] for it is no advantage to the public or public justice that such matters should be detailed Though the publication of such proceedings may be to the disadvantage of the particular individual concerned yet it is of vast importance to the public that the proceedings of the Court of Justice should be universally known The general advantage to the country in having these proceedings made public more than counter balances the inconvenience to private persons whose conduct may be the subject of such proceedings [6]

The report should be confined to what takes place in the Court and the two things, report and comment should be kept separate The reporter ought not to mix up with the report comments of his own If any comments are made they should not be made as a part of the report It is not necessary that the report should be verbatim it must be substantially a fair account of what took place It is sufficient to publish a fair abstract [8] But even though the report is a fair one yet if it is sent for publication by a person with malicious motives an action will lie [9] The report must not be one sided or highly coloured [10] Damages may be recovered for a grossly exaggerated and libellous title

[1] *Bindeshwari Prasad Tiwari* v *Hanuman Prasad Tiwari* (1923) 22 A L J 65 *Ghulam Rasool* v *Ibrahim Beg* (1933) 11 O W N 122

[2] *Blagg* v *Sturt* (1846) 10 Q B 899

[3] *Steele* v *Brannan* (1872) L R 7 C P 261 268 *The King* v *Carlile* (1819) 3 B & Ald. 167 See to the same effect s 3 of the Law of Libel Amendment Act 1888 (51 & 52 Vic. c. 64)

[4] *Brook* v *Evans* (1860) 29 L J Ch 616

[5] The Judicial Proceedings (Regulation of Reports) Act 1926 16 & 17 Geo V c. 61

[6] *The King* v *Wright* (1799) 8 T R. 293 298

[7] *Andrews* v *Chapman* (1853) 3 C & K. 286 A report of a libellous speech of a counsel without the evidence by which it was supported is not a fair report *Kane* v *Mulvany* (1866) Ir R. 2 C L 402 No comment is allowed until the proceeding terminate *Lewis* v *Levy* (1858) 27 L J Q B 282

[8] *Milissich* v *Lloyds* (1877) 46 L J Q B 404

[9] *Stevens* v *Sampson* (1879) 5 Ex D 53

[10] *Stiles* v *Nokes* (1806) 7 East 493

Reports of *ex parte* proceedings are also privileged[1] A fair and accurate report of the judgment in an action published *bona fide* and without malice, is privileged although not accompanied by any report of the evidence given at the trial

The Law of Libel Amendment Act 1888[3] provides that a fair and accurate report in any newspaper of proceedings publicly heard before any Court exercising judicial authority shall if published contemporaneously with such proceedings be privileged The Act does not say whether such privilege is absolute or qualified

The privilege given by the common law to reports of proceedings before a Court of Justice open to the public does not extend to a proceeding before a domestic tribunal such as the stewards of the Jockey club at which the public are not entitled to be present[4]

During the hearing of a libel action counsel for the plaintiff criticized the behaviour of a person D The plaintiff who was the only witness in the case in his evidence also commented adversely upon D s behaviour Thereupon D said to the Judge May I make an application? I want to contradict the many lies that have been told in this Court. That intervention was reported in five newspapers and the plaintiff brought actions for libel against them alleging that the reports were defamatory of him. It was held that the application which D made to the Court was made in the course of judicial proceedings and that as the report was fair and accurate it was protected[5]

2 *Parliamentary proceeding*

A fair and accurate report of any proceedings or debate in either House of Parliament or in any committee thereof is privileged even though it contains matter defamato y of an individual[6] Such publication is privileged on the principle that the advantage of publicity to the community at large outweighs any private injury resulting from the publication

If the subject of a debate is of public interest legitimate criticism could be fully made in a newspaper[7] This privilege would not protect a journalist imputing criminal conduct to a person on statements made in the course of the debate[8]

3 *Quasi judicial proceedings*

Publication of true accurate and *bona fide* proceedings of quasi-

[1] *Usill v Hales* (1878) 3 C P D 319 *Kimber v The Press Association Ltd* [1893] 1 Q B 65 See *M Gregor v Thwaites* (1824) 3 B & C 24
Macdougall v Knight (1890) 25 Q B D 1

[3] 51 & 52 Vic c 64 s 3

[4] *Chapman v Lord Ellesmere* [1932] 2 K B 431

[5] *Farmer v Hyde* [1937] 1 K B 728

[6] *Goffin v Donnelly* (1881) 6 Q B D 307 *Lala Lajput Rai v The Englishman* (1909) 13 C W N 895 (1910) 14 C W N 713

[7] *Wason v Walter* (1868) L R 4 Q B 73 See *Mangena v Wright* [1909] 2 K B 958

[8] *Lala Lajput Rai v The Englishman* sup

judicial bodies is privileged [1] Speeches made at the meetings of local or any other boards are privileged The privilege is not lost even if outsiders are present [2] But the publication of such speeches in newspapers will not be privileged if they contained matters not of public interest [3]

4 *Proceedings in public meetings*

A report in a newspaper of the proceedings of a public meeting is privileged provided it is (1) fair (2) accurate (3) not blasphemous and (4) not indecent The privilege may be rebutted by showing (1) that the report was published maliciously or (2) that the defendant has refused or neglected on request to insert in the same newspaper a reasonable letter by way of contradiction or explanation of such report If the meeting be not necessarily or properly a public one there is no privilege

This privilege is statutory and is given by the Law of Libel Amendment Act [4] at common law there was no such privilege

Remedies for defamation

As to the remedies for defamation not only may a suit for damages be brought but the publication of defamatory statements may be restrained by injunction see the Specific Relief Act s 55 ill (*e*)

Who can sue —The publication of defamation can seldom give a right of action to any one but the person defamed [6] The fact that a defamatory statement has caused damage to other persons does not entitle them to sue [7] Such damage is considered to be too remote [8] Thus a brother cannot sue for slander of his sister [9] nor a father for defaming his daughter [10] nor a heir and nearest relation of a deceased person for defamatory words spoken of the deceased [11]

According to the Madras High Court a husband cannot therefore maintain a suit for defamatory words imputing unchastity to his wife Otherwise the slanderer might be liable to as many actions as there are near relations of the person defamed [12] But the Calcutta High Court permits the husband to sue where unchastity is imputed to his wife [13] It has also held

[1] *Allbutt* v *General Council of Medical Education* (1889) 23 Q B D 400
[2] *Pittard* v *Oliver* [1891] 1 Q B 474
[3] *Purcell* v *Sowler* (1876) 1 C P D 781
[4] 51 & 52 Vic c 64 s 4
[5] Act I of 1877
[6] *Subbaiyar* v *Kristnaiyar* (1878) 1 Mad 383 *Brahmanna* v *Ramakrishnama* (1891) 18 Mad 250 *Oodia* v *Bhowanee* (1866) 1 Agra H C 264 *Daya* v *Param Sukh* (1888) 11 All 104 If such a person is not *sui juris* then a suit can be brought by his guardian or next friend *Daya* v *Param Sukh* (1888) 11 All 104 In a suit for libel defamatory of a firm all the partners should be joined as plaintiffs *Mati Lal Raha* v *Indra Nath Bannerjee* (1909) 36 Cal 907
[7] *Luckumsey* v *Hurban* (1881) 5 Bom. 580
[8] *Ashley* v *Harrison* (1739) Peake 194 256 In this case the proprietor of a public amusement brought an action against a man for a libel on one of his performers by reason whereof she was deterred from appearing on the stage but it was dismissed
[9] *Subbaiyar* v *Kristnaiyar* sup
[10] *Daya* v *Param Sukh* sup
[11] *Luckumsey* v *Hurbun* sup
[12] *Brahmanna* v *Ramakrishnama* sup
[13] *Sukan Teli* v *Bipal Teli* (1906) 4 C L J 388

that if words defamatory of one person cause actual damage to another the latter can maintain an action[1]

Damages for libel and slander—Damages recoverable in an action for defamation will depend upon the nature and character of the libel the extent of its circulation[2] the position in life of the parties[3] and the surrounding circumstances of the case[4]

A civil Court is not bound to give damages for defamation after the defendant has been convicted and fined for the offence in the criminal Court where the plaintiff has suffered no actual damage[5]

Aggravation of damages—The violence of the defendant s language the nature of the imputation conveyed and the fact that the defamation was deliberate and malicious will enhance the damages

The Court will consider the fact that the attack was entirely unprovoked and that the defendant was culpably reckless or grossly negligent in the matter The defendant s subsequent conduct may aggravate the damages[6] e.g if he has refused to listen to any explanation or to retract the charge he made[7] or has only tardily published an inadequate apology Plea of justification if persisted in will tend to aggravate damages[8]

Mitigation of damages—It is permissible to a defendant to seek to mitigate damages by proving any of the following circumstances —(1) Evidence falling short of justification[9] (2) absence of malice[10] (3) apology at the earliest opportunity[11] (4) retaliation by defendant plaintiff being in the habit of libelling the defendant[12] (5) provocation

[1] *Giruar Singh* v *Sitaman Singh* (1905) 32 Cal 1060

[2] The fact that the libel is published in a newspaper is an important consideration in assessing damages *Lajpat Rai* v *The Englishman* (1909) 36 Cal 883

[3] See *Vaidianatha Sastriar* v *Soma sundara Thambiran* (1913) 24 M L J 8

[4] If the libel is merely a technical one and has not damaged the plaintiff s reputation nominal damages and costs would ordinarily be awarded *Lieut Col Gidney* v *The A I & D E Federation* (1930) 8 Ran 250 See *Dina Nath* v *Sayad Habib* (1929) 10 Lah 816

[5] *Ooma Churn* v *Grish Chunder* (1875) 25 W R. 22 The whole doctrine of awarding penal and exemplary damages in cases of libel is due to the illegitimate encroachment of the considerations of punishment by fine in criminal jurisprudence into the realm of civil litigation in England and should not be followed in this country per Sadasiva Aiyar J in *Naganatha* v *Subramania* (1917) 5 L W 598

[6] *Ogilvie* v *The Punjab Akhbarat and Press Company* (1929) 11 Lah 45

[7] See *Lajpat Rai* v *The Englishman* (1909) 36 Cal 883

[8] *Ogilvie* v *The Punjab Akhbarat and Press Company* sup An unsustained plea of justification is a good ground for depriving a party of his costs *Makhanlal* v *Panchamlal* (1934) 31 N L R. 27

[9] *McGregor* v *Gregory* (1843) 11 M & W 287 *Churchill (Lord)* v *Hunt* (1819) 2 B & Ald 685 *Clarke* v *Taylor* (1836) 2 Bing N C 654

[10] *Pearson* v *Lemaitre* (1843) 5 M & G 700 If a newspaper publishes information supplied by a correspondent no malice will be attributed to it *Ogilvie* v *The Punjab Akhbarat and Press Company* sup

[11] Lord Campbell s Act 1843 (6 & 7 Vic c 96) s. 2

[12] *Finnerty* v *Tipper* (1809) 2 Camp 72

by plaintiff [1] bad reputation of plaintiff [2]

Injunction.—The Court has jurisdiction to interfere on interlocutory application to restrain the publication of a libel But this jurisdiction will not in general be exercised unless the applicant satisfies the Court that the statements in the document complained of are untrue [3] Further there should be some likelihood of immediate and pressing injury to person or property of the plaintiff [4] or to his trade [5]

Indian law.—In India the Courts have jurisdiction to restrain the publication of a libel by injunction under s 54 cl (i) of the Specific Relief Act [6]

Joint action.—An action for slander cannot be brought jointly against several defendants separate actions should be brought against each Each person sued for verbal slander is responsible only for what he himself has uttered and the plaintiff is not entitled to bring him before the Court while he is proving his case against another defendant for what the first defendant is not himself responsible But an action for slander may be brought jointly against several defendants where the words spoken are not actionable *per se* but only become so by reason of the special damage which is the result of the conjoint action of all the defendants [7]

In libel each person is liable for the entire publication and therefore all may be properly sued together [8] If several persons are libelled by the publication of a statement all of them cannot bring a joint action against the defendant but must sue him separately [9]

1 *Tarpley* v *Blaby* (1835) 7 C & P 395

2 *Providence* v *Christenson* (1914) 7 B L T 155

3 *Quartz Hill Con Gold Mining Co* v *Beall* (1882) 20 Ch D 501 *Bonnard Perryman* [1891] 2 Ch 269 This case lays down an absolute rule of practice with regard to the circumstances under which an interlocutory injunction ought to be granted pending the trial in actions of libel *Manson* v *Tussauds Ltd* [1894] 1 Q B 671

4 *Salomons* v *Knight* [1891] 2 Ch 294

5 *Thomas* v *Williams* (1880) 14 Ch D 864 *Collard* v *Marshall* [1892] 1 Ch 571

6 The decision in *Shepherd* v *The Trustees of the Port of Bombay* (1876) 1 Bom. 132 was given before this Act came into force

7 *Woozeerunissa Bibee* v *Syed Mahomed* (1875) 15 Beng L R 166n. See however Order I rule 2 Civil Procedure Code.

8 Per Pontifex J in *Nilmadhub* v *Dookeeram* (1874) 15 Beng L R 161 166 See *Smith* v *Streatfeild* [1913] 3 K B 764

9 *Aldridge* v *Barrow* (1907) 34 Cal 662

CHAPTER XIV

WRONGS AFFECTING FREEDOM AND REPUTATION

1 Malicious Prosecution 2 Malicious Civil Proceedings.
3 Abuse of Legal Process

1 *Malicious I cution*

MALICIOUS prosecution is malicious institution against another of unsuccessful criminal[1] or bankruptcy or liquidation proceedings without reasonable or probable cause

In an action for malicious prosecution the plaintiff must prove—

1 That he was prosecuted by the defendant

2 That the proceedings complained of terminated in favour of the plaintiff if from their nature they were capable of so terminating

3 That the prosecution was instituted against him without any reasonable or probable cause

4 That the prosecution was instituted with a malicious intention that i not with the mere intention of carrying the law into effect but with an intention which was wrongful in point of fact[4]

5 That he has suffered special damage when the proceedings are other than criminal proceedings unless the proceedings are such as from their very nature are calculated to injure the credit of the plaintiff[5]

1 Prosecution by defendant —The prosecution for an offence must have been instituted by the defendant against the plaintiff It is no excuse for the defendant that he instituted the prosecution under the order of a Court if the Court was moved by the defendant s false evidence to give the order For otherwise the defendant would be allowed to take

1 *Abrath* v *The North Eastern Ry Co* (1883) 11 App Cas 247 11 Q B D 440 Prosecution und r the Public Health Act (38 & 39 Vic c 55) does not entitle the person wrongfully prosecuted to bring an action for malicious prosecution *Wiffen* v *Bailey & Romford Urban Council* [1915] 1 K B 600

Johnson v *Emerson* (1871) L R 6 Ex 329 *Chapman* v *Pickersgill* (1762) 2 Wils 145 *Metropolitan Bank Ltd* v *Pooley* (1885) 10 App Cas 210

3 *Quartz Hill Con Gold Mining Co* v *Eyre* (1883) 11 Q B D 674

4 *Abrath* v *North Eastern Ry* sup *Lister* v *Perryman* (1870) L R 4 H L 521 *Baboo Ganesh Dutt* v *Mugneeram* (1872) 11 Beng L R 321 P C *Harish Chunder Neogy* v *Nishi Kanta Banerjee* (1901) 28 Cal. 591 *Syama Charan* v *Jhatoo Halder* (1901) 6 C W N 298 *P M Mody* v *Queen Insurance Co* (1900) 2 Bom L R 938 25 Bom. 332 *Dunne* v *Legge* (1866) 1 Agra H C 38 *Umrao* v *Jaisukh* (1882) 2 A W N 83 *Ganesh Prasad* v *Mahip Rai* (1885) 5 A W N 175 *Swami Nayudu* v *Subramania* (1864) 2 M. H C 158 *Moonee* v *Municipal Commissioner of Madras* (1875) 8 M H C 151 *Minakshisundrum Pillai* v *Ayyathorai* (1894) 18 Mad 136 *Indar Bahadur Singh* v *Sukhdeo Prasad* (1932) 9 O W N 1067

5 *Quartz Hill Consolidated Gold Mining Co* v *Eyre* sup

advantage of his own fraud upon the Court which ordered the prosecution [1] Similarly if the prosecution is launched on the information supplied by the defendant the defendant will be liable even though he may not have himself figured as the complainant in the criminal Court [2] The person liable is the prosecutor to whose instigation the proceedings are due Instigating a prosecution is to be distinguished from the act of merely giving information on the strength of which a prosecution is commenced by someone else in the exercise of his own discretion [3]

It is not a principle of universal application that if the police or Magistrate act on information given by a private individual without a formal complaint or application for process the Crown and not the individual becomes the prosecutor If a complainant does not go beyond giving what he believes to be correct information to the police, and the police without further interference on his part (except giving such honest assistance as they may require) think fit to prosecute it would be improper to make him responsible in damages for the failure of the prosecution But if the charge is false to the knowledge of the complainant if he misleads the police by bringing suborned witnesses to support it if he influences the police to assist him in sending an innocent man for trial before the Magistrate it would be equally improper to allow him to escape liability because the prosecution has not technically been conducted by him The question in all cases of this kind must be Who was the prosecutor? And the answer must depend upon the whole circumstances of the case The mere setting of the law in motion is not the criterion the conduct of the complainant, before and after making the charge, must also be taken into consideration. Nor is it enough to say that the prosecution was instituted and conducted by the police That again is a question of fact Theoretically all prosecutions are conducted in the name and on behalf of the Crown but in practice this duty is often left in the hands of the person immediately aggrieved by the offence, who *pro hac vice* represents the Crown A private person may be allowed to conduct a prosecution under s 495 of the Criminal Procedure Code When this is permitted it is obviously an element to be taken into consideration in judging who is the prosecutor and what are his means of information and motives [4] The defend

[1] *Fitzjohn v Mackinder* (1861) 9 C B N S 505 followed in *Musa Yakub Mody v Manilal Ajitrai* (1904) 7 Bom L R 20 29 Bom. 368

[2] *Periya Goundan v Kuppa Goundan* (1919) 42 Mad. 880 *Shanmugha Udayar v Kandasami Asari* (1920) 12 L W 170 dissenting from *Narasinga Row v Muthaya Pillai* (1903) 26 Mad. 362

[3] *Cohen v Morgan* (1825) 6 D & R. 8 *Dubois v Keats* (1840) 11 A. & E 329 See *Jagadamba Prasad v Raghunandan Lal* (1920) 1 P L. T 422 *Raja Gopala Nayagar v Spencer & Co* (1920) 12 L. W 87 *Rajagopala Naicker v Spencer & Co* (1920) 28 M L. T 298

[4] *Gaya Parshad Tewari v Bhagat Singh* (1908) 35 I A 189 192 10 Bom L R. 1080 followed in *Tummala Nagabushanam v Madunuru Venkataratnam* (1910) 8 M L. T 242 *Bandi v Ramadin* (1909) 6 A L. J 516 *Hari Charan Sant v Kailash Chandra Bhuyan* (1908) 36

ants though their names did not appear on the face of the proceedings except as witnesses, were directly responsible for a charge of rioting being made against the plaintiff had produced false witnesses to support the charge at the investigation by the police had taken the principal part in the conduct of the case before the police and in the Magistrate s Court had instructed the counsel who appeared for the prosecution at the trial that the plaintiff had joined the riot , and had done all they could to procure the conviction of the plaintiff who was acquitted being found not to have been present at the rioting It was held they were rightly found liable for damages in an action for malicious prosecution [1]

A prosecution commences according to the Bombay High Court when a complaint is made and it is not necessary in order to maintain this action that the charge should have been acted upon by a Magistrate It is enough if the charge is made to the Magistrate with a view to induce him to entertain it [2] The Calcutta [3] Madras [4] Allahabad [5] Patna [6] and Rangoon[7] High Courts have held that a suit for damages for malicious prosecution does not lie where no process has been issued to the plaintiff to appear If no process is actually issued but an order for the issue of

Cal 278 *In re Sanjeevi Reddy* (1911) 9 M L T 172 [1911] 1 M W N 149 *Manikam Mudaliar* v *Muni swami Naidu* [1915] M W N 911 29 M L J 694 *Jagnarain Dubey* v *Bidapat Dubey* (1922) 4 P L T 202 *Radha Kishan* v *Kedar Nath* (1924) 22 A L J 761 *Nagendra Nath Ray* v *Basanta Das Bairagaya* (1929) 57 Cal 26 *Gajraj* v *Chandrika Pershad* (1928) 5 O W N 1039 *N S Iyer* v *S A S M R Chetyyar* (1932) 10 Ran 282

The question of the amount of damages is a question of fact and it is not open to the High Court to interfere in second appeal upon such a question *Musammat Dhuman* v *Syed Abdullah Khan* (1909) 31 All 333 *Banee Madhub Chatterjee* v *Bholanath Banerjee* (1868) 10 W R 164 *Jogeshwar Sarma* v *Dinaram Sarma* (1898) 3 C L J 140

[1] *Gaya Prasad* v *Sirdar Bhagat Singh* (1908) 35 I A 189 10 Bom L R 1080 See *Dudhnath Kandu* v *Mathura Prasad* (1902) 24 All 317 *Venkatappayya* v *Ramakrist namma* (1931) 34 L W 898 Where the defendants conspired to prosecute the plaintiff and in furtherance of their design defendant No 1 figured as the complainant in a cognizable offence of which information was lodged by him to the police and the latter prosecuted the plaintiff on the faith of such information it was held that the defendants prosecuted the plaintiff *Muhammad Sharif* v *Nasir Ali* (1930) 53 All 44

[2] *Ahmedbhai* v *Framji* (1903) 5 Bom L R 940 28 Bom 226 *Maung Myo* v *Maung Kyuat E* (1918) 3 U B R (1917 1920) 88

The Chief Court of Oudh has adopted the view of the Bombay High Court *Gur Saran Dass* v *Israr Haidar* (1927) 1 Luck C 492

[3] *De Rozario* v *Gulab Chand Anundjee* (1910) 37 Cal 358 following *Yates* v *The Queen* (1885) 14 Q B D 648 *Golap Jan* v *Bhola Nath* (1911) 38 Cal 880 *Nagendra Nath Ray* v *Basanta Das Bairagya* (1929) 57 Cal 26 The former Chief Court of the Punjab adopted this view *Godha Ram* v *Devi Das* (1914) P R No 1 of 1915

[4] *Sheik Meeran Sahib* v *Ratna velu Mudali* (1912) 37 Mad 181 *Sanjivi Reddy* v *Koneri Reddi* (1925) 49 Mad 315 *Arunachella Mudaliar* v *Chinnamunusamy Chetty* [1926] M W N 527

[5] *Ali Muhammad* v *Zakar Ali* (1931) 53 All 771

[6] *Subhag Chamar* v *Nand Lal Saha* (1928) 8 Pat 285

[7] *Gouri Singh* v *Bokka Veri* (1935) 13 Ran 764

advantage of his own fraud upon the Court which ordered the prosecution [1] Similarly if the prosecution is launched on the information supplied by the defendant the defendant will be liable even though he may not have himself figured as the complainant in the criminal Court [2] The person liable is the prosecutor to whose instigation the proceedings are due Instigating a prosecution is to be distinguished from the act of merely giving information on the strength of which a prosecution is commenced by someone else in the exercise of his own discretion [3]

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ants though their names did not appear on the face of the proceedings except as witnesses were directly responsible for a charge of rioting being made against the plaintiff had produced false witnesses to support the charge at the investigation by the police had taken the principal part in the conduct of the case before the police and in the Magistrate's Court had instructed the counsel who appeared for the prosecution at the trial that the plaintiff had joined the riot and had done all they could to procure the conviction of the plaintiff who was acquitted being found not to have been present at the rioting It was held they were rightly found liable for damages in an action for malicious prosecution[1]

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[5] *Ali Muhammad* v *Zakar Ali* (1931) 53 All 771

[6] ... v *Nand* ... *Saha* (... 285

[7] *Gowri* ... *Bokka* ... (1935) 13

process is formally recorded and the accused appears the prosecution must be deemed to have commenced[1]

Where on a complaint being made the Magistrate sent the case to the police for inquiry and report but never issued process it was held by the Calcutta High Court that no cause of action lay against the person lodging the complaint The Rangoon High Court has followed this view[3] The Madras High Court has followed the Calcutta High Court where a Magistrate issued only a notice but not a summons to the accused on receiving a complaint of defamation and subsequently dismissed it after hearing counsel for both the parties[4]

The Allahabad High Court has also held that it is not necessary that the criminal proceedings should have been heard out to the end it is sufficient if they have been initiated though they may have fallen through for technical reasons unconnected with the merits[5]

Where the plaintiff s house was searched in consequence of the complaint by the defendant the defendant was held liable by the Patna High Court though the complaint was dismissed before any summons or warrant was issued against him[6]

Security and sanction proceedings—According to the Madras High Court an application to a Magistrate to take security under the Code of Criminal Procedure does not afford a cause of action for malicious prosecution[7] But the Calcutta High Court has held that any enforcement of the criminal law through Courts of Justice concerning a matter which will subject the accused to a prosecution without regard to the technical form in which the charge has been preferred and irrespective of the grade of the criminal offence is a sufficient proceeding upon which an action of malicious prosecution may be based The word prosecution in malicious prosecution should not be interpreted in the restricted sense in which it is used in the Criminal Procedure Code it is not essential that the original proceeding should have been of such a nature as to render the person against whom it was taken liable to be arrested fined or imprisoned[8] A suit for malicious prosecution will lie where the plaintiff is obliged to defend himself in proceedings in a civil Court for sanction instituted by the defendant without just reasonable or probable cause[9]

[1] *Zahiruddin Mohammad* v *Budhi Bibi* (1933) 12 Pat 292
[2] *De Rozario* v *Gulab Chand Anundjee* (1910) 37 Cal 358
[3] *Gouri Singh* v *Bokka Venkanna* (1935) 13 Ran 764
[4] *Sheik Meeran Sahib* v *Ratnavelu Mudali* (1912) 37 Mad 181
[5] *Azmat Ali* v *Qurban Ahmad* (1920) 18 A L J 305
[6] *Jai Pande* v *Jaldhari Raut* (1917) 4 P L W 98
[7] *Kandasami* v *Subramania* (1903) 13 M L J 370
[8] *Croudy* v *L O Reilly* (1912) 17 C W N 554 17 C L J 105 *Bishun Persad* v *Phulman Singh* (1914) 19 C W N 935
[9] *Narendra Nath De* v *Jyotish Chandra Pal* (1922) 49 Cal 1035 *Rabindra Nath Das* v *Jogendra Nath Das* (1928) 56 Cal 432 *Nagarmull Chaudhuri* v *Jhabarmull Sureka* (1933) 60 Cal 1022

Prosecution does not mean prosecution before a Magistrate or a criminal Court[1] The Allahabad[2] and Lahore[3] High Courts hold the same view as the Calcutta High Court

2 Termination of proceedings in favour of plaintiff—It is essential to show that the proceeding alleged to be instituted has terminated in favour of the plaintiff if from its nature it be capable of such a termination The reason seems to be that if in the proceeding complained of the decision was against the plaintiff and was unreversed it would not be consistent with the principles on which law is administered for another Court not being a Court of appeal to hold that the decision was come to without reasonable and probable cause[4] The plaintiff need not prove an acquittal for a prosecution may be determined in various ways It is enough if the prosecution has been discontinued[6] or if the accused has been acquitted or discharged[8] or if a conviction has been quashed for some defect in the proceedings[9] or if the order granting sanction to prosecute is set aside on appeal[10]

There is one exception to the rule that the prosecution must have terminated favourably to the plaintiff namely where the proceeding in respect of which the action is brought is *ex parte*[11] In such a case the result naturally terminates unfavourably to the plaintiff

In an action for malicious prosecution the cause of action arises not on the date of the institution of the proceeding complained of but on the date the proceeding terminates in favour of the plaintiff[12]

[1] *Rabindra Nath Das* v *Jogendra Nath Das* (1928) 56 Cal 432

Mohammad Niaz Khan v *Jai Ram* (1919) 17 A L J 776

[3] *Fakir Chand* v *Khushi Ram* (1933) 34 P L R 931

[4] Per Crompton J in *Castrique* v *Behrens* (1861) 3 E & E 709 721 *Gilding* v *Eyre* (1861) 10 C B N S 592 *Besebe* v *Mathews* (1867) L R 2 C P 684 688 *Balbhaddar Singh* v *Badri Sah* (1926) 28 Bom L R 921 1 Luck 215 P C *U Soe* v *Maung Ngue Tha* (1927) 5 Ran 705 See to the same effect *Gopalkrishna* v *Bangle Narayana* [1918] M W N 434 34 M L J 517 *Maung Tha Hla* v *Mokhlas* (1915) 9 B L T 48 *Partab Singh* v *Hari Singh* (1928) 29 P L R 366 *N S Iyer* v *S A S M R Chettyar* (1932) 10 Ran 282 Cases which laid down that the plaintiff must prove that he was innocent of the charge upon which he was tried are no longer of any authority in view of the Privy Council decision in *Balbhaddar's* case viz *Harish Chunder* v *Nishi Kanta* (1901) 28 Cal 591 *Syama Charan* v *Jhaloo* (1901) 6 C W N 298 *Sheik Muchi Osta* v *Horsmul Marwari* (1912) 17 C W N 431 *Nelliappa* v *Kailappa* (1900) 24 Mad 59 *Padashin* v *Maung Lun* (1907) 8 L B R 78 *Goberdhan* v *Ram Badan* (1922) 44 All 485 *Satishchandra Banerji* v *Lala Munilal* (1932) 59 Cal 1073

Selw N P 1005

[6] *Watkins* v *Lee* (1839) 5 M & W 270

[7] *Wicks* v *Fentham* (1791) 4 T R 247 *Balbhaddar Singh* v *Badri Sah* (1926) 1 Luck 215 28 Bom. L R. 921 P C. *Mata Prasad* v *Secretary of State for India in Council* (1929) 5 Luck 157

[8] *Venu* v *Coorya* (1881) 6 Bom. 376

[9] *Johnson* v *Emerson* (1871) L R 6 Ex 329 394 *Wicks* v *Fentham* sup

[10] *Nagarmull Chaudhuri* v *Jhabarmull Sureka* (1933) 60 Cal 1022

[11] *Steward* v *Gromett* (1859) 7 C B N S 191

[12] *Chhaganlal* v *Thana Municipality* (1931) 34 Bom. L R 143

3 Reasonable and probable cause—The plaintiff must give some evidence of the want of reasonable and probable cause before the defendants can be called upon to show the existence of such a cause.[1] Reasonable and probable cause is an honest belief in the guilt of the accused based on a full conviction founded upon reasonable grounds, of the existence of a state of circumstances which assuming them to be true would reasonably lead any ordinarily prudent and cautious man placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed There must be, first an honest belief of the accuser in the guilt of the accused secondly such belief must be based on an honest conviction of the existence of the circumstances which led the accuser to that conclusion thirdly such secondly mentioned belief must be based upon reasonable grounds that is such grounds as would lead any fairly cautious man in the defendant s situation so to believe fourthly the circumstances so believed and relied on by the accuser must be such as amount to a reasonable ground for belief in the guilt of the accused

All that the defendant has to be satisfied about is that there is reasonable and probable cause for the charge i e reasonable grounds for believing that the plaintiff is guilty of the offence and not reasonable grounds for coming to the conclusion that the Court would convict him of it[3] In order to justify a defendant there must be a reasonable cause—such as would operate on the mind of a discreet man there must also be a probable cause—such as would operate on the mind of a reasonable man at all events such as would operate on the mind of the party making the charge otherwise there is no probable cause for him[4] The test which has received the most approbation is partly abstract and partly concrete Was it reasonable and probable cause for any discreet man? Was it so to the maker of the charge?[5] Mere circumstances of suspicion cannot be relied on as evidence of reasonable and probable cause[6] The prosecutor s belief in the guilt of the accused must be based on grounds which or some

[1] *Abrath v North Eastern Ry Co* (1883) 11 App Cas 247 11 Q B D 440 *Raghunathrao v Motiram* (1933) 30 N L R 101 *Basdeo v Shyama Charan* [1936] A. L J R 803 *Mangal v Maiku* [1937] O W N 226 *Bhawani Shanker v Raghunath Dayal* [1937] A L J R 331 *Lodd Govindoss v Arumuga Mudali* (1937) 46 L W 680

[2] *Hicks v Faulkner* (1878) 8 Q B D 167 171 *Lister v Perryman* (1870) L. R 4 H L 521 *Broad v Ham* (1839) 5 Bing N C 722 *Bhim Sen v Sita Ram* (1902) 24 All 363 *Shama Bibee v Chairman of Baranagore Municipality* (1910) 12 C L J 410 *Ma Iu v Moung San Thein* (1899) 6 Burma L R 153 *Vogiatis v Pappademitriou* (1912) 6 B L T 59

[3] *Vydinadier v Krishnaswami Iyer* (1911) 36 Mad 375 *Ferozshah v Woutersz* (1902) P R No 60 of 1902 *Faghfur Mirza v Bhagowti Parshad* (1895) 1 O D 786 *Pannar v Khunnu* [1936] A L J R 256

[4] Per Tindal C J in *Broad v Ham* sup p 725

[5] Per Holloway C J in *Goday Narrain v Sri Ankitam Venkata* (1871) 6 M H C 85 *Dwarka Das v Harihar* (1884) 4 A W N 1

[6] *Busst v Gibbons* (1861) 30 L J Ex 75 followed in *Ahmedbhai v Framji* (1903) 5 Bom. L. R. 910 28 Bom. 226

of which are reasonable and arrived at after due inquiry[1] It is not required of any prosecutor that he must have tested every possible relevant fact before he takes action His duty is not to ascertain whether there is a defence but whether there is reasonable and probable cause for a prosecution[2]

The existence of reasonable and probable cause is of no avail if the prosecutor prosecuted in ignorance of it[3] The dismissal of a prosecution does not create any presumption of the absence of reasonable and probable cause[4] If a man prefers an indictment containing several charges whereof for some there is and for others there is not probable cause his liability for malicious prosecution is complete[5]

The opinion of counsel as to the propriety of instituting a prosecution will not excuse the defendant if the charge was a malicious one[6] But if a party lays all the facts of his case fairly before counsel and acts *bona fide* upon the opinion given by that counsel (however erroneous that opinion may be) he is not liable

If the charge is found to be false the *onus* would be on the defendant to show that he has reasonable and sufficient cause for making it[8]

The fact that the plaintiff has been acquitted is not *prima facie* evidence that the charge was unreasonable and false[9] But the fact that he has been convicted by a competent Court although he may subsequently have been acquitted on appeal is evidence if unrebutted of the strongest possible character against the plaintiff s necessary plea of want of reasonable and probable cause[10] It does not however follow that the suit will

[1] *Jamnadas* v *Chunilal* (1920) 22 Bom L R 1207 1211

[2] *Herniman* v *Smith* [1938] 1 All E R 1

[3] *Delegal* v *Highley* (1837) 3 Bing N C 950

[4] *Byne* v *Moore* (1813) 5 Taunt 187 *Mitchell* v *Jenkins* (1833) 5 B & Ad 588 594

[5] *Reed* v *Taylor* (1812) 4 Taunt 616 *Ellis* v *Abrahams* (1846) 8 Q B 709 followed in *Ahmedbhai* v *Framji* (1903) 5 Bom L R 940

[6] *Heulett* v *Crutchley* (1813) 5 Taunt. 277 *Munhordas* v *Goculdas* (1902) 4 Bom L R 560 *Yachend rulu* v *Narayanasami* (1898) 9 M L J 110 *Maya Mal* v *Madho Mal* (1884) P R No 40 of 1884

[7] *Ravenga* v *Mackintosh* (1824) 2 B & C 593 *Nurse* v *Rustomi Dorabji* (1924) 46 M L J 353 355 see *Bonnan* v *Imperial Tobacco Co* (1929) 31 Bom L R 1388 P C although it is a case of malicious prosecution of civil action

[8] *Bishonath* v *Ram Dhone* (1869) 11 W R 42 6 Beng L R 375n *Vengama* v *Raghava* (1864) 2 M H C 291 *Gunga Pershad* v *Ramphal Sahoo* (1873) 20 W R 177 *Weatherall* v *Dillon* (1874) 6 N W P 200 *Annundloll Doss* v *Jointeechunder* (1866) 1 Ind Jur N S 93 *Mahadeo Prashad* v *Chunni Lal* (1925) 28 O C 387 2 O W N 62 *Gajraj* v *Chandrika Pershad* (1928) 5 O W N 1039

[9] *Byne* v *Moore* (1874) 5 Taunt 187 *Mitchell* v *Jenkins* (1833) 5 B & Ad. 588 594 See *Nund Kishore* v *Kishen Dyal* (1868) P R No 4 of 1868 *Mosalli* v *Habib Khan* (1879) P R No 19 of 1879 *Pestonji M Mody* v *Queen Insurance Co* (1900) 2 Bom. L R. 938 25 Bom 332 *Ebrahim Suliman* v *Esuff Suliman* (1897) P J L B 387

[10] *Jadubar Singh* v *Sheo Saran* (1898) 21 All 26 *Parimi* v *Bellamkonda* (1866) 3 M H C 238 *Ramayya* v *Sivayya* (1900) 24 Mad. 549 *Shivram* v *Dhondu* (1886) P J 9 *Dongrussee* v *Girdharee* (1868

not lie where the plaintiff has been convicted by a competent Court and has been acquitted on appeal The true principle is that the suit will lie if the plaintiff was ultimately acquitted on appeal by reason of the original conviction having proceeded on evidence which was known by the complainant to be false or on the wilful suppression by him of material information [1] An accusation which has been held by a criminal Court to be unfounded is sufficiently *prima facie* evidence that the accusation was maliciously brought [2] But the proceedings in a criminal Court are not evidence in a civil Court [3] It is for the civil Court to go into all the evidence and decide for itself whether malice or want of reasonable and probable cause existed or not [4] The judgment of a criminal Court is admissible in evidence to establish the fact that an acquittal has taken place and not to ascertain the grounds upon which the acquittal proceeded [5]

In an action for malicious prosecution the plaintiff must allege and prove affirmatively the non existence of reasonable and probable cause in an action for false imprisonment it is for the defendant to prove affirmatively the existence of reasonable and probable cause [6]

According to English law the question whether there was reasonable and probable cause for the defendant s proceedings is one for the Judge on the facts found by the jury In India the Judge becomes himself the

10 W R 439 *Kazee Koibutoollah v Motee* (1870) 13 W R 276 *Shama Bibee v Chairman of Baranagore Municipality* (1910) 12 C L J 410 *Gunga Ram v Hoolasee* (1870) 2 N W P 88 *Jagnarain Dubey v Bidapat Dubey* (1922) 4 P L T 202 Where there has been such a conviction a suit will not lie save in very exceptional circumstances *Soobramony Pillay Chetty v Maung Po Lu* (1903) 2 L B R 111 *Nga Tun Gyau v Mi Po Me* (1906) U B R. Tort, p 5 But the ruling in the former case is held to have gone too far *Padashin v Maung Lun* (1907) 8 L B R 78 In *Padarath v Dulam* (1912) 10 A L J 423 Knox J says that conviction by the first Court when it is reversed in appeal is not sufficient evidence of the existence of reasonable and probable cause The conduct of the complainant before and after making the charge and whether the charge was false to his knowledge should be taken into consideration in deciding whether there was reasonable and probable cause See *Shubrati v Shams ud din* (1928) 50 All 713

1 *Boja Reddi v Perumal Reddi* (1902) 26 Mad 506 *Shubrati v Shams ud din* (1928) 50 All 713 The plaintiff will have to show that the original conviction proceeded on evidence known to the complainant to be false or was due to the wilful suppression by him of material information *Kona Thimma Reddi v Bathini Chenna Reddi* (1906) 16 M L J 18

2 *Heera Chand v Banee Madhub* (1866) 6 W R 29 *Bindeshwari Prasad Tiwari v Hanuman Prasad Tiwari* (1923) 22 A. L J 65

3 *Aghorenath Roy v Radhika Pershad* (1870) 14 W R 339 *Gulabchand v Chunilal* (1907) 9 Bom L R 1134

4 *Shubrati v Shams ud din* (1928) 50 All 713 *Mohammad Haroon v Asghar Hussain* (1931) 10 Pat 812 *Venkatapathi v Balappa* (1933) 56 Mad. 641 *Chaturbhuj v Manji Ram* [1936] A L J R 594

5 *Venkatapathi v Balappa* sup *Chaturbhuj v Manji Ram* sup *Ferozshah v Woutersz* (1902) P R No 60 of 1902

6 *Nagendra Nath Ray v Basanta Das Bairagya* (1929) 57 Cal 25

7 *Sutton v Johnstone* (1786) 1 T R 493 515 *Turner v Ambler* (1847) 10 Q B 252 260 *Lister v Perryman* (1870) L R 4 H L. 521 535 *Hermann v Smith* [1938] 1 All E R 1

judge of the law and the facts[1] and the balance of authorities is in favour of the view that the question is a mixed one of law and fact

Leading case ABRATH v NORTH EASTERN RAILWAY

In the leading case one M had recovered from the respondents a large sum as compensation for personal injuries in respect of a railway collision On certain information having been given to the directors of the respondent company they instituted inquiries The result of those inquiries was laid before counsel who advised that Dr Abrath the appellant should be prosecuted for conspiring with M to defraud the respondents by falsely pretending that M had been injured in the collision and by artificially manufacturing symptoms of injury The respondents accordingly prosecuted Dr Abrath who was acquitted In an action brought by him against the respondents for malicious prosecution it was held that the respondents were not liable as they did take reasonable care to inform themselves of the true facts and that they honestly believed in the case laid before the Magistrate[3]

4 Malicious intention —The proceedings complained of by the plaintiff must be initiated in a malicious spirit that is from an indirect and improper motive and not in furtherance of justice[4] The malice necessary to establish is not even malice in law such as may be assumed from the intentional doing of a wrongful act malice in fact—*malus animus* —indicating that the party was actuated either by spite or ill will towards an individual or by indirect or improper motives though these may be wholly unconnected with any uncharitable feeling towards anybody[5] It is a wish to injure the party rather than to vindicate the law To sustain the averment of malice the charge must be wilfully false[6]

[1] *Harish Chundra* v *Nishi Kanta* (1901) 28 Cal 591 *Himatkhan* v *Himatkhan* (1872) P J 183 *Municipality of Jambusar* v *Girjashanker* (1905) 7 Bom L R 655 *Naik Pandey* v *Bidya Pandey* (1916) 1 P L J 149 See however *Pestonji M Mody* v *Queen Insurance Co* (1900) 25 Bom 332 2 Bom L R 938 P C which lays down that in Indian Courts a finding as to reasonable and probable cause in an action for malicious prosecution is a question of fact though according to English law it is a question left for the Judge to determine See *Shama Bibee* v *Chairman of Baranagore Municipality* (1910) 12 C L J 410 which is not followed in *Kasi reddi Chenna Reddi* v *Patchipulusu Venkatasuami* (1919) 26 M L T 214

Nagendra Nath Ray v *Basanta Das Bairagya* (1929) 57 Cal 25 Questions of malice and reasonable and probable cause are questions of law but facts upon which those questions of law are to be determined are questions of fact *Mohammad Haroon* v *Asghar Hussain* (1931) 10 Pat 842

[3] *Abrath* v *N E Ry Co* (1886) 11 App Cas 247

[4] Per Bowen L J in 11 Q B D 455 Any motive other than that of simply instituting a prosecution for the purpose of bringing a person to justice is a malicious motive on the part of the person who acts in that way *Stevens* v *Midland Coun Ry* (1854) 10 Ex 352 *Madhu Lal* v *Sahai Pande* (1900) 27 Cal 532 *In re Sanjeevi Reddy* (1911) 9 M L T 172 [1911] 1 M W N 149 *Nagendra Nath Ray* v *Basanta Das Bairagya* sup *Chhaganlal* v *Thana Municipality* (1931) 34 Bom. L R 143

[5] *Hicks* v *Faulkner* (1878) 8 Q B D 167 175 *Bhim Sen* v *Sita Ram* (1902) 24 All 363 *Yogia* v *Pappa demitriou* (1913) 6 B L T 59

[6] *Cohen* v *Morgan* (1825) 6 D & R 8

It is not a wrongful act for any person who honestly believes that he has reasonable and probable cause though he has not in fact to put the criminal law in motion against another but if to the absence of such reasonable and probable cause a malicious motive operating upon the mind of such prosecutor is added that which would have been a rightful (in the sense of a justifiable) act if done without malice becomes with malice wrongful and actionable. If when he instituted criminal proceedings the prosecutor knew he had no reasonable ground for the steps he was taking the definition of malice given by Bayley J in *Bromage* v *Prosser*[1] viz a wrongful act done intentionally without just cause or excuse would distinctly apply and no further proof of malice would be required but if he really believed he had such reasonable cause although in fact he had it not and was actuated not by such belief alone but also by personal spite or a desire to bring about the imprisonment of or other harm to the accused or to accomplish some other sinister object of his own that personal enmity or sinister motive would be quite sufficient to establish the malice required by law to complete a cause of action[2]

Malice is generally implied upon proof of absence of reasonable and probable cause for instituting the prosecution complained of[3] But there must be something more of the nature of an indirect or sinister motive for the prosecution than the mere absence of reasonable and probable cause The absence of reasonable and probable cause is not *per se* evidence of malice and a finding that the defendant honestly believed in the case is conclusive against the plaintiff s right of action[4] Conversely the most express malice will not give a cause of action if reasonable and probable cause existed[5] nor can absence of the latter be inferred from the existence of malice

The bringing of a charge false to the knowledge of the prosecutor imports in law malice sufficient to support a civil action[6] A prosecution

1 (1825) 4 B & C 247 255

2 Per Lord Brampton in *Quinn* v *Leathem* [1901] A C 495 524

3 *Sutton* v *Johnstone* (1786) 1 T R. 493 544 *Bhim Sen* v *Sita Ram* (1902) 24 All 363 *Ramayya* v *Sivayya* (1900) 24 Mad 549 *Hall* v *Venkatakrishna* (1890) 13 Mad 394 *Goday* v *Ankilam* (1871) 6 M H C 85 *Rai Jung Bahadur* v *Rai Gudor* (1897) 1 C W N 537 *Sri Nath Shaha* v *L E Ralli* (1905) 10 C W N 253 *Abdul Shakur* v *Lipton & Co* (1923) 6 L L J 1 *Maung Set Khaing* v *Maung Tun Nyein* (1925) 3 Ran 82 *Shivaratan Singh* v *Ram Siroman* (1927) 2 Luck. 487 Preferring an unfounded criminal charge against the plaintiff with the indirect motive of bringing pressure on him to settle a civil action is evidence of malice *Nurse* v *Rustomji Dorabji* (1924) 46 M L J 353

4 *Munhordas* v *Goculdas* (1902) 4 Bom L R. 560 *Brown* v *Hawkes* [1891] 2 Q B 718 *Shama Bibee* v *Chairman of Baranagore Municipality* (1910) 12 C L J 410 *Kasireddi Chenna Reddi* v *Patchipulusu Venkataswami* (1919) 26 M L T 214 *Evans* v *Secretary of State for India* (1919) P R No 143 of 1919

5 *Willans* v *Taylor* (1829) 6 Bing 183 *N S Iyer* v *S A S M R Chettiar* (1932) 10 Ran 282

6 *Hira Lal* v *Bandhu* (1889) 9 A W N 189 *Sukhdeo* v *Bhojan* (1890) 10 A W N 243 *Radhe Lal* v *Munnoo* (1913) 11 A. L. J 125 *Futtu Lal* v *Ram Sarup* (1918) 16 A. L. J

though at the outset not malicious may nevertheless become malicious in any of the stages through which it has to pass if the prosecutor having acquired positive knowledge of the innocence of the accused perseveres in the prosecution.[1] But if the defendant has honestly and *bona fide* instituted the prosecution he is not liable although owing to a defective memory he has forgotten the true facts and has gone on with the prosecution.[2] Carelessness on the part of the defendant in deciding whether there was reasonable and probable cause would not amount to malice. If a man is reckless whether the charge be true or false that might amount to malice but not recklessness in coming to the conclusion that there was reasonable and probable cause[3]

Malice is not to be inferred merely from the acquittal of the plaintiff[4] The plaintiff must prove independently of acquittal that his prosecution was malicious and without reasonable and probable cause[5]

In England whether there was malice in the defendant is a question of fact for the jury[6] In India it is a question of law[7]

5 Special damage —When the proceedings are not criminal proceedings it is necessary to show some special damage resulting to the plaintiff The damage need not necessarily be pecuniary There are three sorts of damages any one of which would be sufficient to support an action for malicious prosecution (1) the damage to a man s fame as where the matter whereof he is accused is scandalous (2) the damage done to the person as where a man is put in danger of losing his life, limb or liberty

168 *Maung Set Khaing* v *Maung Tun Nyein* (1925) 3 Ran 82 See *Abrath* v *N E Ry Co* (1883) 11 Q B D 440 462 *Broad* v *Ham* (1839) 5 Bing N C 722 727 *Alam khan* v *Banemiya* (1925) 28 Bom L R 459 *Khaje Hussenuddin* v *Kisan* (1929) 25 N L R 180 *Alexander Brault* v *Indra Krishna Kaul* (1933) 60 Cal 918 *Jiwan Das* v *Hakumat Rai* (1933) 15 Lah 262

[1] *Fitzjohn* v *Mackinder* (1861) 9 C B N S 505 531 *Municipality of Jambusar* v *Girjashankar* (1905) 7 Bom L R 655 30 Bom 37 *Shama Bibee* v *Chairman of Baranagore Municipality* (1910) 12 C L J 410 *Rabindra Nath Das* v *Jogendra Nath Das* (1928) 56 Cal 432 *N S Iyer* v *S A S M R Chettyar* (1932) 10 Ran 282

[2] *Hicks* v *Faulkner* (1878) 8 Q B D 167 The pivot upon which this action turns is the state of mind of the prosecutor at the time he institutes or authorizes the prosecution If he receives information from others and acts upon it by making a criminal charge against any person the motives of his informants or the truth in fact of the story they tell are to a great extent beside the point. The crucial questions for consideration are Did the prosecutor believe the story upon which he acted? Was his conduct in believing it and acting on it that of a reasonable man of ordinary prudence? Had he any indirect motive in making the charge? Per Lord Atkinson in *Corea* v *Peiris* [1909] A. C 549 555 followed in *Gopalkrishna* v *Bangle* (1918) 34 M L J 517

[3] *Vydinadier* v *Krishnaswami Iyer* (1911) 36 Mad 375 *A mat Ali* v *Qurban Ahmad* (1920) 18 A. L J 305 2 U P L R. (All) 427

[4] *Roshun* v *Nobin* (1870) 12 W R 402 6 Beng L R 477n *Maung Po Lun* v *Ma Nyein Bon* (1918) 3 U B R (1917 1920) 67

[5] *Jiwan Das* v *Hakumat Rai* (1933) 15 Lah 262

[6] *Hicks* v *Faulkner* sup p 174 *Mitchell* v *Jenkins* (1833) 5 B & Ad. 588

[7] *Naik Pandey* v *Bidya Pandey* (1916) 1 P L J 149

(3) the damage to a man's property as where he is forced to expend his money in necessary charges to acquit himself of the crime of which he is accused[1] The damage must also be the reasonable and probable result of the malicious prosecution and not too remote Proceedings in bankruptcy against a trader[2] or liquidation proceedings against a company[3] ruin the reputation of the trader or the company and therefore an action lies for instituting such proceedings maliciously and without reasonable and probable cause Similarly an action lies for instituting maliciously and without reasonable and probable cause proceedings for professional misconduct against a legal practitioner under the Legal Practitioners Act[4] or for prosecution under the Municipal Act[5]

False imprisonment and malicious prosecution distinguished — (1) False imprisonment is wrongfully restraining the personal liberty of the plaintiff malicious prosecution is wrongfully setting the criminal law in motion against him

In *Austin* v *Dowling*[6] Willes J says — The distinction between false imprisonment and malicious prosecution is well illustrated by the case where parties being before a magistrate one makes a charge against another whereupon the magistrate orders the person charged to be taken into custody and detained until the matter can be investigated The party making the charge is not liable to an action for false imprisonment because he does not set a ministerial officer in motion but a judicial officer The opinion and judgment of a judicial officer are interposed between the charge and the imprisonment There is therefore at once a line drawn between the end of the imprisonment by the ministerial officer and the commencement of the proceedings before the judicial officer Thus the question is does the defendant set a ministerial or a judicial officer in motion? If the former he may be liable for false imprisonment if the latter for malicious prosecution The reason for this distinction lies in the fact that a man cannot be sued for false imprisonment unless he himself has acted wrongfully[7] A Court of Justice acts in the exercise of its own discretion and its acts cannot render a person who seeks its protection liable for false

[1] *Savile* v *Roberts* (1698) 1 Ld. Raym 374 378 See *Sitramulu Naidu* v *Kolandaivelu Mudali* (1916) 20 M L T 308 where it is held that an action for malicious prosecution lies for a prosecution under the Cattle Trespass Act If the plaintiff has not spent anything toward the expense of defence the amount being paid by an other person and there being no legal liability to repay the amount no damages can be awarded *Indar Bahadur Singh* v *Sukhdeo Prasad* (1932) 9 O W N 1067

[2] *Johnson* v *Emerson* (1871) L. R. 6 Ex. 329

[3] *Quartz Hill Con Gold Mining Co* v *Eyre* (1883) 11 Q B D 674 690

[4] *Nityanand* v *Babu Ram* [1937] A L J R. 528

[5] *Ahmedabad Municipality* v *Panubhai* (1934) 37 Bom. L R 468

[6] (1870) L R 5 C P 534 540 *Monmotho Nath Dutt* v *Chairman of the Cossipore Chitpore Municipality* (1905) 9 C W N 736

[7] See *Hopkins* v *Grote* (1836) 4 Ad. & F 774 *Harris* v *Dignum* (1859) 29 L. J Ex. 23

imprisonment.[1] He is liable for malicious prosecution if he maliciously and without reasonable and probable cause sets a Court of Justice in motion

(2) In false imprisonment the onus lies on the defendant to plead and prove affirmatively the existence of reasonable and probable cause as his justification whereas in an action for malicious prosecution the plaintiff must allege and prove affirmatively its non existence The reason for this distinction is that any interference with a man's personal liberty is *prima facie* wrongful and therefore has to be justified but any one is *prima facie* entitled to set the criminal law in motion Imprisonment is a tort prosecution is not so in itself [2]

(3) In an action for false imprisonment it is not necessary for the plaintiff to prove that the defendant was actuated by malice

Damages —Damages are given on two grounds (1) on the ground of a solatium for injury to the feelings of the party prosecuted and (2) as a reimbursement for legitimate expenses incurred by him in his defence [3] The expense of counsel is not a proper element in the calculation of damages awardable to a successful plaintiff [4]

When the plaintiff has prosecuted the defendant in a criminal Court and the latter has been convicted he cannot sue the defendant in a civil Court for the expenses incurred by him in prosecuting the defendant in the criminal Court [5]

Where both the plaintiff and the defendant are actuated by malicious motives nominal damages will be awarded [6]

3 *Malicious civil proceedings*

An action will not lie for maliciously and without reasonable and probable cause instituting an ordinary civil suit because the successful defendant who is unreasonably sued is compensated by a decree in his favour

[1] See *Lock* v *Ashton* (1848) 12 Q B 871 *Brown* v *Chapman* (1848) 6 C B 365 *West* v *Smallwood* (1838) 3 M & W 418 *Carratt* v *Mortley* (1841) 1 Q B 18

Panton v *Williams* (1841) 2 Q B 169 181 *Hicks* v *Faulkner* (1878) 8 Q B D 167 170 *Thakdi Hajji* v *Budrudin Saib* (1906) 29 Mad 208

[3] *Rai Jung Bahadur* v *Rai Gudor* (1897) 1 C W N 537 *Bunnomali* v *Hurrydass* (1882) 8 Cal 710 *Shama Churn* v *Beharee Lall* (1870) 14 W R 443 *Huro Lall* v *Huro Chunder* (1869) 12 W R 89 *Annundloll Doss* v *Jomteechunder* (1866) 1 Ind Jur N S 93 *Vogiatzis* v *Pappademitriou* (1913) 6 B L T 59 The shares of the sons in joint family property are not liable in execution of a decree obtained against their father for damages for malicious prosecution *Sunder Lal* v *Raghunandan Prasad* (1923) 3 Pat 250 Exemplary damages may be awarded to punish the defendant where the plaintiff is grossly harassed *Venkatappayya* v *Ramakristnamma* (1931) 34 L W 898

[4] *Goday* v *Ankitam* (1871) 6 M H C 85 Full costs can be awarded though the decree in favour of the plaintiff be of a fraction of his claim *Godha Ram* v *Devi Das* (1914) P L R No 14 of 1916 See *In re Sanjeevi Reddy* (1911) 9 M L T 172 [1911] 1 M W N 149

[5] *Fazal Imam* v *Fazul Rasul* (1889) 12 All 166

[6] *Badri Das* v *Nathu Mal* (1901) P R No 112 of 1901

which gives him his costs against the plaintiff. But such a suit will lie if there is damage to credit or reputation or arrest of person or seizure of property[1] or where damage resulting from civil action cannot be recompensated by an order for costs.[2] The Privy Council while holding that if a suit is brought on the advice of legal advisers it cannot be said to have been instituted without reasonable or probable cause though the advice proves to be wrong observed: "It is not material for them to consider what other conditions may be necessary to enable a plaintiff to succeed in a suit of this nature."[3]

Section 35A of the Code of Civil Procedure provides for compensatory costs in respect of false or vexatious claims.

4 *Abuse of legal process*

To put into force the process of the law maliciously and without any reasonable and probable cause is wrongful and if thereby another is prejudiced in property or person there is that conjunction of injury and loss for which an action will lie.[4] Absence of reasonable and probable cause for taking legal action in execution or otherwise is some evidence from which malice may be inferred.[5] Termination of the proceedings taken in favour of the plaintiff is essential. But if the defendant has dropped the proceedings it is not necessary for the plaintiff to show that the proceedings ended in his favour.[6]

According to Indian authorities an action will lie for the improper issue of mesne and other legal process.

Section 95 of the Code of Civil Procedure gives a summary remedy to a defendant to get compensation where an arrest or attachment before judgment has been effected or a temporary injunction has been granted—

1 *Quartz Hill Con. Gold Mining Co.* v. *Eyre* (1883) 11 Q B D 674, 690, judgment of Bowen L J; *Pranshankar* v. *Govindhlal* (1876) 1 Bom 467; *Abdul Samad* v. *Rahmatulla* (1889) P R No 162 of 1889; *Bishun Singh* v. *A W N Wyatt* (1911) 14 C L J 515; *Imperial Tobacco Co.* v. *Bonnan* (1927) 46 C L J 455. No suit lies for damages against a defendant for maliciously and without reasonable or probable cause obtaining a perpetual injunction which was subsequently dissolved on appeal: *Mohini Mohan* v. *Surendra Narayan* (1914) 42 Cal 550; *Norendra* v. *Bhusan* (1920) 31 C. L J 495 F B; *Imperial Tobacco Co.* v. *Bonnan*, sup. A person who unlawfully interferes with the exercise of the property rights of another commits an act in the nature of trespass to property and is liable for damages in an action for trespass: *Bhut Nath* v. *Chandra Binode* (1912) 16 C. L. J 34; *Norendra* v. *Bhusan*, sup., contra *Ram Row* v. *Somasundaram Asary* (1927) 51 Mad. 642; *Nanjappa Chettiar* v. *Ganapathy Goundan* (1912) 35 Mad 598. A suit for damages for wrongfully obtaining a temporary injunction is maintainable: *Har Kumar De* v. *Jagat Bandhu De* (1926) 53 Cal. 1008; *Joy Kalu Dassu* v. *Chandmalla* (1868) 9 W. R. 133.

2 *Ah Fong* v. *Nam Kee* (1934) 12 Ran 289.

3 *Bonnan* v. *Imperial Tobacco Co.* (1929) 31 Bom. L. R. 1388, 1391 P C.

4 *Churchill* v. *Siggers* (1854) 3 E & B 929, 937.

5 *Brown* v. *Hawkes* [1891] 2 Q B 718.

6 *Nichelas* v. *Sitarama Iyyar* (1922) 45 Mad 527.

(1) if such arrest attachment or injunction was applied for on in ufficient ground or

(2) if the plaintiff fails in the suit and there was no reasonable or probable ground for instituting the suit[1] The defendant has simply to present an application to the Court and the Court subject to its pecuniary jurisdiction can give compensation up to one thousand rupees The remedy under the Code is optional and an injured defendant may file a regular suit against the plaintiff for compensation if he has not already sought relief under the above section[2]

This section gives an alternative remedy in cases of wrongful attachment. It does not in any way interfere with the principles regulating suits for damages for the abuse of the process of the Court[3]

Procuring an order for attachment before judgment however maliciou ly does not of it elf afford a cause of action for damages as damage does not necessarily and naturally flow from an application for attachment before judgment.[4] But if an injury is caused to the party against whom the order is issued an action will lie[5]

It would, however be in the interest of an injured defendant to file a separate suit where the compensation awardable under the Code would be altogether insufficient[6]

Malicious arrest —Malicious arrest is wilfully putting the law in motion to effect the arrest of another under civil process without reasonable and probable cause The foundation of an action for malicious arrest i that the party has obtained an order or authority from a Judge to make an arrest by knowingly imposing some false statement upon the Judge, or by stating certain facts as being true within his knowledge when he knew nothing about them or his belief in the truth of a particular statement when he had no reasonable or probable cause for his belief[7]

Indian law —A per on can be said to be arrested when he is actually touched or confined by a police-officer or other person unless there is a submission to the custody by word or action[8] There are several ways whereby a person may become liable for arresting the wrong man If he take an active part in such arrest then he is a trespasser whatever his motive may have been He is also liable when he sets the process of the

[1] See *Shaikh Mahomed Rezaood deen* v *Hoosein Buksh Khan* (1866) 6 W R Mis 24

[2] See *Goburdhun Majhee* v *Banee Chunder Doss* (1874) 21 W R 375 No suit would however lie if the wrongful attachment has not taken place owing to security furnished by the plaintiff *Ramasami Aiyar* v *Govinda Pillai* (1916) 30 M L J 180

[3] See *Nanjappa Chettiar* v *Ganapathi Coundan* (1911) 35 Mad. 598

[4] *Rama Ayyar* v *Govinda Pillai* (1915) 39 Mad 952

[5] *Nicholas* v *Sivarama Ayyar* (1922) 45 Mad 527

[6] See *Wilson* v *Kanhya Sahoo* (1869) 11 W R 143 See *Palani Kumarasamia Pillai* v *Udayar Nadan* (1908) 32 Mad. 170

[7] *Daniels* v *Fielding* (1846) 16 M & W 200 206 *Walley* v *M'Connell* (1849) 13 Q B 903 See *Clissold* v *Cratchley* [1910] 2 K B 244 249

[8] *U Thwe* v *A Kim Fee* (1929) 7 Ran 598

Court in motion but then he is only responsible if he obtain such process fraudulently or improperly [1] An arrest by the police for a crime procured by the defendant maliciously would afford a cause of action for malicious arrest An action for malicious arrest is not sustainable if the defendant has placed all the facts before the officer having the discretionary power to order such arrest and when such officer with full knowledge of all the facts exercised his discretion and ordered the arrest [3]

A suit to recover damages on account of injuries caused by an arrest in accordance with the execution of a decree of a competent Court can only be maintained under special circumstances The plaintiff must show that—

(1) the original action out of which the alleged injury arose was decided in his favour

(2) the arrest was procured maliciously and without reasonable and probable cause by the defendant [4] and

(3) the injury or damage sustained was something other than an injury which has been or might have been compensated for by an award of the costs of the suit i e he has suffered some collateral wrong [5]

Wrongful execution of process against property—Where a person maliciously and without reasonable and probable cause by means of civil proceedings procures execution or distress against the property of another an action will lie against him for damages [6] The person causing the writ to be issued will be liable [7]

A distinction is drawn between acts done without judicial sanction and acts done under judicial sanction improperly obtained If goods are seized under a writ or warrant which authorized the seizure the seizure is lawful and no action will lie in respect of the seizure unless the person complaining can establish a remedy by proving malice and want of reasonable and probable cause If however the writ or warrant did not authorize the seizure of the goods seized an action would lie for damages occasioned by the wrongful seizure without proof of malice [8]

Indian law—A party to a suit is liable though he acts innocently

[1] *Bheema Charlu v Donti Musti* (1875) 8 M H C 38

[2] *Graham v Henry Gidney* (1933) 60 Cal 955

[3] *Thakdi Hajji v Budrudin Saib* (1906) 29 Mad. 208 *Bacloo Bhaidas v Velji Bhimsey & Co* (1923) 25 Bom. L R 595 See *Lock v Ashton* (1848) 12 Q B 871 to the same effect.

[4] *U Thwe v A Kim Fee* (1929) 7 Ran. 598 In this case a process server showed to the judgment-debtor the warrant of arrest and the judgment debtor thereupon paid up the amount. It was held that he could not be said to have been arrested.

[5] *Raj Chunder Roy v Shama Soondari Debi* (1879) 4 Cal 583

[6] *Waterer v Freeman* (1619) Hob 266 *Grainger v Hill* (1838) 4 Bing N C. 212 *Craig v Hasell* (1843) 4 Q B 481 *Chandler v Doulton* (1865) 3 H & C 553 *The Walter D Wallett* [1893] P 202 *Clissold v Cratchley* [1910] 2 K B 244

[7] *Jarmain v Hooper* (1843) 6 M & G 827

[8] *A R M N Ramanathan Chetty v M K A Meera Saibo Marikar* [1931] A L J 541 61 M L J 330 8 O W N 325 P C.

or mistakenly or inadvertently if by his or his agent s or attorney s order the officer of the Court takes the goods of the wrong person a stranger in execution [1] In England the execution of a decree for money is entrusted to the sheriff an officer who is bound to use his own discretion and is directly responsible to those interested for the illegal seizure of goods which do not belong to the judgment debtor In India warrants for attachment in security are issued on the *ex parte* application of the creditor who is bound to specify the property which he desires to attach and its estimated value. The attachment is the direct act of the creditor for which he is immediately responsible [2] If a person causes an attachment before judgment carelessly and recklessly and without sufficient or reasonable ground he would be liable in damages [3] The proceedings in which the attachment complained of is taken out should have terminated in favour of the plaintiff or that the particular process complained of should have been superseded or discharged [4]

If after having all the facts as to the right of a defendant to particular moveables brought before it the Court after adjudicating on the materials before it were to order the attachment of specified property or decide as to the right of such attachment the order would be the act of the Court and if the decree-holder had acted *bona fide* in bringing the facts fully before the Court he would not be liable.[5] The judgment creditor is not responsible for the mistake or misconduct of the officer unless he or his servants have personally interfered and directed the action of the officer [6]

It is an actionable wrong to issue execution maliciously and without reasonable and probable cause against the property of a judgment debtor for example to seize his goods under a writ of *fieri facias* after the judg

[1] *Soobjan Beebee* v *Shaikh Shureeutoollah* (1869) 12 W R 329 3 Beng L R (A C J) 413 *Kanoye Pershad* v *Hur Chand* (1870) 14 W R 120 5 Beng L R App 71 *Bhusan* v *Norendra* (1920) 32 C L J 236 *Abdul Rahim* v *Sital Prasad* (1919) 17 A L J 856 *Damodhar Tuljaram* v *Lallu Khusaldass* (1871) 8 B H C (A C J) 177 *Goma Mahal Patil* v *Gokaldas Khimji* (1878) 3 Bom 74 *Udaychand Pannalal* v *Thansingh Karam Chand* (1934) 62 Cal 586 A person who assists in the conduct of a search by police is not liable in damages for illegal search *Asan Alliar* v *Masilamani* (1919) 36 M L J 252

[2] *Kissorimohun Roy* v *Harsukh Das* (1889) 17 I A 17 17 Cal 436

[3] *Velaet Ali Khan* v *Matadeen Ram* (1870) 13 W R 3 An action can be maintained though there is no completed attachment and where the defendant drops further proceedings in the suit it is not necessary for the plaintiff to show that those proceedings ended in his favour *Nicholas* v *Sitarama Ayyar* (1922) 45 Mad 527

[4] *Kedarnath* v *Biharilal* (1924) 27 Bom L R 525 49 Bom 629

[5] Per Norman J in *Soobjan Beebee* v *Shaikh Shureeutoolah* sup See *Raj bullub Gope* v *Issan Chunder Hujrah* (1867) 7 W R 355 *Joykalee Dassee* v *Chandmalla* (1868) 9 W R 133 *Dhurmo Narain Sahoo* v *Sreemutty Dossee* (1872) 18 W R 440 If a police-officer outside his jurisdiction helps another police-officer he is not liable in damages for the assistance given though he cannot validly carry on the search himself *Assan Alliar Maraikayar* v *Masilamani Nadar* [1919] M W N 452 36 M L J ? ?

[6] *Doolar Chand Sahoo* v *Sahoy Bruggut* (1875) 24 W R

ment debt has been paid[1] or to get an injunction wrongfully issued

Proof of malice is not necessary when the property of a strange not a party to a suit is taken in execution[3] Where the plaintiff brin ing a suit for abuse of process is a party to a suit, proof of malice is nece sary[4] The plaintiff must prove special damage[5]

If property wrongfully attached is sold the owner of the property sold is entitled to sue either for the restoration of the same specifically for damages If he makes an alternative claim, it is in the option of t Court to award him either according to its own view of the justice of t case[6] The decree holder who has caused the sale of movable property n belonging to his debtor is liable to make good the value of that proper to its rightful owner The rightful owner may follow the property in t hands of the purchaser who purchased it at his own risk and peril[7]

Attachment of rice under money decree—Certain unthreshed rice belon ing to the plaintiff was wrongfully attached by the defendants under a mon decree obtained by them against a third party The rice, while in the custo of a bailiff was clandestinely threshed and carried off by thieves who left t straw In a suit brought by the plaintiff to recover the value of unthreshed ri from the defendants, it was held that the defendants were liable. The the might have rendered the defendants unable to restore the rice *in specie* b could not purge and was no satisfaction of the previous trespass which h rendered the defendants liable for the full value of the rice[8]

Procuring erroneous decision of Court—No action will lie again any person for procuring an erroneous decision of a Court of Justice Th is so even though the Court has no jurisdiction in the matter and althou its judgment or order is for that or any other reason invalid A Court Justice is not the agent or servant of the litigant who sets it in motion as to make that litigant responsible for the errors of law or fact which th Court commits Every party is entitled to rely absolutely on the presum tion that the Court will observe the limits of its own jurisdiction and deci correctly on the facts and law Accordingly a suit to recover damag suffered by the plaintiff by reason of his land having been kept for a ye under attachment under an erroneous order under s. 146 of the Crimin Procedure Code will not lie against the defendant upon whose complai

1 *Bishun Singh* v *Wyatt* (1911) 16 C. W N 510 14 C L J 515

2 *Bhut Nath Pal* v *Chandra Binode* (1912) 16 C L J 34

3 *Kissorimohun Roy* v *Harsukh Das* (1889) 17 I A 17 17 Cal 436 *K A Assan Mahomed* v *S M Kadersa Rowther* (1924) 2 Ran. 181

4 *Goutiere* v *Robert* (1870) 2 N W P 353 *Surajmal* v *Manekchand* (1903) 6 Bom L. R. 701 *Nanjappa Chettiar* v *Ganapathi Gounden* (1911) 35 Mad. 598 *Hukam Chand* v *Umar Din* (1919) P L R No 21 of 1920 See *Palani Kumarasamia Pillai* v *Udayar Nadan* (1908) 32 Mad 170

5 *Nanjappa Chettiar* v *Ganapat Gounden* sup

6 *Mohanund Holdar* v *Ak Mehalder* (1868) 9 W R. 118 *Mo ram* v *Nilkanth Rao* [1937] Nag 1

7 *Kanai Prasad* v *Hirachan* (1870) 5 Beng L R. App 71 14 W R. 120

8 *Coma Mahad Patil* v *Cokald Khimji* (1878) 3 Bom. 74 *Bishamb* v *Caddar* (1910) 8 A L.J 92

the inquiry leading up to the order was initiated[1] No action will lie against any person for issuing execution or otherwise acting in pursuance of a judgment or order of a Court of Justice even though it is erroneous A valid order however erroneous in law or fact is a sufficient justification for any act done in pursuance of it.[2] The remedy of the aggrieved party is to appeal and not to bring an action for damages

Where the defendant honestly but wrongly arrested the plaintiff and charged him with an offence before a Magistrate, who remanded him in custody it was held that although the defendant was liable for the arrest he was not liable for the subsequent remand which was an erroneous act of the Magistrate.

Damages —In awarding damages for malicious arrest the costs and expenses incurred by the plaintiff by reason of the arrest and in obtaining his discharge must be taken into consideration

In the case of loss arising from wrongful attachment the measure of damages will be the value of the goods at the time of the wrongful attachment The litigation and delay and also any depreciation of the goods by an intermediate fall in the market between attachment and sale are the natural and necessary consequences of the unlawful act for which damages are recoverable If the defendant s act was without a probable cause and evinced a malicious motive on his part damages should be in the nature of penalty as well as of compensation.[6]

[1] *Rani Mina Kumari* v *Surendra Narain Chakravarty* (1909) 14 C W N 96 *Mohini Mohan Misser* v *Surendra Narain Singh* (1914) 42 Cal 550

[2] *Bachoo Bhaidas* v *Velji Bhimsey & Co* (1923) 25 Bom. L R. 595 *Williams* v *Smith* (1863) 14 C B N S 596

[3] *Lock* v *Ashton* (1848) 12 Q B 871

[4] *Goma Mahad Patil* v *Gokaldas Khimji* (1878) 3 Bom. 74 See *Mudhun Mohun Doss* v *Gokul Doss* (1866) 10 M I A 563

[5] *Kissorimohan Roy* v *Harsukh Das* (1889) 17 I A 17 17 Cal. 436 *Bishamber Nath* v *Gaddar* (1910) 8 A L J 92

[6] *Velaet Ali Khan* v *Matadeen Ram* (1870) 13 W R. 3

CHAPTER XV

WRONGS RELATING TO DOMESTIC AND OTHER MISCELLANEOUS RIGHTS

MISCELLANEOUS DOMESTIC RIGHTS

- RIGHTS (Seduction)
  1. Marital rights.
  2. Parental rights.
  3. Rights to the services of servant
- RIGHTS
  1. Inducing breach of contract.
  2. Right of business occupation etc
  3. Right to an exclusive office dignity or title
  4. Right to sue for wrongful dismissal

DOMESTIC RIGHTS SEDUCTION

1 *Marital rights*

Marital rights include the right of a husband to the society of his wife, and the right to the exclusive possession and control of her person The wrongs that may be caused to a husband in respect of these rights are —

(1) Enticing away his wife

(2) Criminal conversation with her and

(3) Physically injuring her

(1) According to common law a husband has a right of action against any one who entices away or harbours his wife or persuades her to live separate from him without a sufficient cause.[1] The gist of the action is the loss of the *consortium* of the wife, which term implies an exclusive right against an invader to her affection companionship and aid[2] *Per quod consortium amisit* (whereby he has lost the benefit of her society) was an allegation used in all such actions.

A wife owes the duty to her husband to reside and consort with him, and any one who without justification procures entices or persuades her to violate this duty commits a wrong towards the husband for which he is entitled to recover damages To succeed in such an action the husband need not prove that the will of his wife was overborne by the stronger will of the defendant[3]

If the act by which a husband loses the comfort and affection of his wife is a lawful act no action can be maintained[4]

A wife has a right of action against another woman for deprivation of her husband s society Such an action would lie just as would the

1 Blackstone iii 139

2 *Ibid* p 140

3 *Place* v *Searle* [1932] 2 K B 497

4 *Winsmore* v *Greenbank* (1745) Willes 577 581

suit of a husband whose wife had been induced to leave him The right of consortium is a mutual right of husband and wife and if any one violated it either husband or wife could sue for damages for that wrong But the plaintiff must prove that the defendant had induced the plaintiff's husband to leave his home and to give up his wife.[1]

(2) In regard to cases of criminal conversation (adultery) with one's wife the action rested upon the same ground as that of enticing the wife away from her husband to wit the loss of *consortium*[2] It could not therefore be brought where the husband had previously separated from his wife[3] The law gave to the husband a writ of trespass *vi et armis* against the adulterer This action was abolished by an Act of Parliament in 1857 and redress turned over to the Divorce Court[4] But a wife cannot bring an action for damages solely in respect of adultery committed with her husband

(3) The common law allowed a husband to bring an action for physical injury caused to the wife The wife as well as the husband could each bring an action The wife can sue for the injury caused to her and the husband for the loss of her society and service (*consortium et servitium*) These two actions may be brought separately or together[5] If the wife is killed the husband's claim for loss of *consortium et servitium* is limited to the interval between her injury and her death At common law no action lies for the death[6] But he may claim compensation if the cause of her death was a breach of contract between himself and the defendant[7] or if the cause of action came under the Fatal Accidents Act

Indian law —A suit by a husband for enticing away his wife is maintainable It is immaterial that at the time of enticing away of the wife the husband is in another town It is an infringement of the plaintiff's rights under the contract of marriage that gives rise to the action.[8] A suit for damages can be maintained against a person who without lawful excuse persuades a wife not to return to her husband's house[9]

Damages —In actions for adultery the damages are always exemplary The amount is affected by a consideration of the state of affection or otherwise in which the husband and wife previously lived by the previous immoral character or otherwise of the wife or by the conduct

[1] *Gray* v *Gee* (1923) 39 T L R 429 *Newton* v *Hardy* (1933) 49 T L R 522

[2] *Wooduard* v *Walton* (1807) 2 B & P N R 476

[3] *Weedon* v *Timbrell* (1793) 5 T R 357

[4] 20 & 21 Vic. c. 85 s. 33 Section 33 provides that a husband may either in a petition for dissolution of marriage or for judicial separation or in a petition limited to such object only claim damages from any person on the ground of his having committed adultery with the wife of such petitioner

[5] *Brocklebank* v *Whitehaven Jun Ry Co* (1862) 7 H & N 834

[6] *Baker* v *Bolton* (1808) 1 Camp 493

[7] *Jackson* v *Watson & Sons* [1909] 2 K. B 193

[8] *Sobha Ram* v *Tika Ram* (1936) 58 All 903

[9] *Muhammad Ibrahim* v *Gulam Ahmed* (1864) 1 B H. C. 236

of the defendant as having been a gross breach of hospitality or friendship The amount of damages is not to be measured by the co-respondent's wealth but by the injury which the husband has sustained through his act[1] A petition for damages is independent of and not ancillary to a petition for divorce It may be presented after the death of the wife

2 *Parental rights*

These are rights to the custody and control of children and to the produce of their labour till they arrive at the age of twenty-one Children over twenty-one, unless rendering actual service, are not within this rule but in the position of ordinary servants

The rights are infringed by any act which interferes prejudicially with the custody of or control over children by their parent or with the advantage which he derives from their services if they were old enough to render any the person interfering having notice of the right of the parent.

Just as a master can bring an action for injuries to his servants so a father can bring an action for injuries to his children if they are capable of performing acts of service[3] Proof of their living under their father's roof is sufficient evidence of service[4]

3 *Rights to the services of servants*

(*a*) Every person who maliciously or with notice interrupts the relation subsisting between master and servant—

(1) by procuring the servant to depart from his master's service or

(2) by harbouring and keeping him as servant after he has quitted the service, and during the time stipulated for as the period of service [5] or

(3) by beating or confining him in such a manner that he is rendered incapable of performing his work

commits an actionable wrong

(1) The taking of any servant or apprentice out of the service of another is actionable.[6] But no action lies for seducing a servant from his master who has paid the penalties stipulated for his leaving him.[7] An action lies against a third person who maliciously induces another to break his contract of exclusive personal service with an employer although the relation of master and servant may not strictly exist between the employer and the employed[8]

[1] *Darbishire v Darbishire & Baird* (1890) 62 L T 664

[2] *Kent v Atkinson* [1923] P 142

[3] *Hall v Hollander* (1825) 4 B & C 660

[4] *Jones v Brown* (1795) 1 Peake 306

[5] *Lumley v Gye* (1853) 2 E & B 216

[6] *Barham v Dennis* (1599) Cro. Eliz 770

[7] *Evans v Walton* (1867) L R 2 C P 615 In this case the plaintiff was a publican and his daughter lived with him and acted in the capacity of a barmaid but without any express contract of service and was induced by the defendant to leave the plaintiff's house

[8] *Bowen v Hall* (1881) 6 Q B D 333, *De Francesco v Barnum* (1890) 45 Ch D 430

(2) The mere employment or harbouring of a servant who is known to have quitted the service of another is not actionable at common law but is made so by a statute.[1] The person retaining must have notice of the existing contract But if the agreement to do work is unreasonable and not binding an action will not lie against a third person for enticing the contracting party away

(3) Where injury is caused to a servant besides the action which the servant himself may have against the wrong doer the master also a a recompense for his immediate loss may maintain an action The master must allege and prove the special damage he has sustained by the injury to his servant [4] It is the invasion of the legal right of the master to the services of his servant that gives him the right of action If therefore a servant is beaten the master cannot bring an action unless the battery is so great that by reason thereof he loses the service of his servant, though the servant can sue for every small battery [5] A master however cannot bring an action for injuries to his servant where those injuries cause his death [6] In a civil Court the death of a human being could not be complained of as an injury

Damages —The measure of damages is not to be ascertained at the actual loss which the plaintiff sustained at the time of enticing away of his servants but for the injury done him by causing them to leave his employment [8] A master cannot count as part of his damage by the loss of his employee s services sums which he has to pay because his contract of employment binds him to pay wages to the servant while alive and a pension to his widow when he is dead [9] This case is subsequently distinguished in another case in which it has been held that a pension may no doubt be properly regarded as payment for past services but that fact does not exclude it from consideration in estimating the value of the services lost [10]

Seduction

In the case of female children the father or guardian and in the case of female servants the employer has a right of action for seduction

[1] *Bird* v *Randall* (1762) 3 Burr 1346 An action will not lie for the mere harbouring or sheltering of a person who is under a contract of service to another even with notice of such contract of service *J Brukousky* v *Thacker Spink & Co* (1870) 6 Beng L R 107

Blake v *Lanyon* (1795) 6 T R 221

[3] *De Francesco* v *Barnum* (1890) 45 Ch D 430

[4] *Berringer* v *The Great Eastern Ry* (1879) 4 C P D 163 See *Brajendra Kissore Roy Choudhuri* v *Luffeman* (1909) 13 C W N 485

[5] *Grinnell* v *Wells* (1844) 7 M & G 1033 1042

[6] *Osborne* v *Gillet* (1873) L R 8 Ex 88 *Clark* v *London General Omnibus Co Ltd* [1906] 2 K B 648

[7] *Baker* v *Bolton* (1808) 1 Camp. 493

[8] *Gunter* v *Astor* (1819) 4 Moore 12 *Hodsoll* v *Stallebrass* (1840) 11 A. & E 301

[9] *Admiralty Commissioners* v *S.S. America* [1917] A. C. 38 61

[10] *Bradford Corporation* v *Webster* [1920] 2 K. B 135

that is for the debauching of such child or servant To support the action—

(1) There must be proof of actual or constructive service at the date of seduction [1]

(2) The child or servant must have been rendered ill and incapable of rendering service in consequence of the seduction, apparently whether it did or did not result in pregnancy and confinement [2]

Female children —The foundation of the action by a father to recover damages against the wrong doer for the seduction of his daughter has been placed upon the loss of service of the daughter in which service he is supposed to have a legal right or interest.[3] The legal relationship of father and child does not by itself justify the maintenance of the action The maintenance of the action is only justified by the legal fiction that a child living with the parent is a servant and the action is maintainable where the daughter is under twenty-one years of age without any proof of actual services rendered but after that age is passed there must be proof of either a contract of service or actual service,[4] such as making tea or milking cows [5] Where actual services are rendered whatever their character and however personal to the mother they are deemed to be rendered to the father and not to the mother and are rendered to him not as the father but in his capacity as master of the house and home.[6] Thus seduction is not actionable *per se* but only when it results in an actual loss of service The old form of pleading was *per quod servitium amisit* (whereby he lost the benefit of her service [7])

The right of the father continues even though the child be in the service of another person for several hours of each day [8] but it does not where that person has a right to the whole of the services of the child [9]

A father can maintain an action of seduction but a mother cannot if seduction took place during the lifetime of the father who died without bringing the action [10] Because the relation of master and servant exists in the father s lifetime exclusively between the father as head of his family and the daughter as his child and one of the family and one of the house

[1] *Hedges* v *Tagg* (1872) L R 7 Ex 283 *Davies* v *Williams* (1847) 10 Q B 725

[2] *Manvell* v *Thomson* (1826) 2 C. & P 303 *Eager* v *Grimwood* (1847) 1 Ex 61

[3] *Grinnell* v *Wells* (1844) 7 M & G 1033 1041 *Rist* v *Faux* (1863) 4 B & S 409

[4] Per Avory J in *Peters* v *Jones* [1914] 2 K. B 781

[5] *Carr* v *Clarke* (1818) 2 Chit 260 261 *Maunder* v *Venn* (1829) Mood & Mal 323

[6] *Beetham* v *James* [1937] 1 K. B. 527 530

[7] *Evans* v *Walton* (1867) L. R 2 C P 615 622

[8] *Rist* v *Faux* sup

[9] *Hedges* v *Tagg* sup *Whitbourne* v *Williams* [1901] 2 K B 722 *Barnes* v *Fox* [1914] 2 I R 276 *Shine* v *Archdeacon* [1931] I R 366

[10] *Hamilton* v *Long* [1903] 2 I R 407 [1905] 2 I R 552 *Peters* v *Jones* [1914] 2 K. B 781

hold which he maintained[1] As head of the family he was guardian of his daughter during minority and when she became adult so long as she resided under his protection in the family home he was regarded as master in respect of all services yielded to or for him in the course of family duty There is no trace of suggestion in English lawbooks that a mother during the father s lifetime could be regarded at common law as mistress jointly with her husband or separately She was merged in her husband

A person standing in the relation of a parent or in *loco parentis* is permitted to recover damages for an injury of this nature[3] e g a brother in the absence of the father[4] or a putative father even though he is not married to the girl s mother[5]

Female servants —In the case of a female servant a master can sue the person who seduces her and thus deprives him of her services The usual cause of this loss of service is pregnancy and child birth

If a man brings a girl into his own service in order to seduce her the relation of master and servant is not contracted between them and the girl s father can maintain an action for seduction[6]

Thus if the daughter or servant be in the actual service of a person other than the plaintiff at the time when the act is committed the action cannot be maintained and the minority of the debauched female makes no difference except in so far as that in the case of a minor daughter her parent s right to her services automatically revives upon the termination of any contract of service under which she may be temporarily employed[7]

Where the actual relation of master and servant subsists an action will lie for enticing away such servant without proof that the defendant debauched her[8]

Leading cases—TERRY v HUTCHINSON DEAN v PEEL

Seduction after dismissal from service—In the first leading case the plaintiff s daughter being under age left his house and went into service After nearly a month the master dismissed her at a day s notice and the next day on her way home to her father s house the defendant seduced her it was held that as soon as the real service was put an end to by the master whether rightfully or wrongfully the girl intending to return home the right of the father to her services revived, and there was, therefore sufficient evidence of service to maintain an action for the seduction[9]

[1] Per Lord O brien L C J in *Hamilton* v *Long* [1903] 2 I R 407 411
[2] Per Gibson J in *Hamilton* v *Long* ibid p 414
[3] *Irwin* v *Dearman* (1809) 11 East 23
[4] *Murray* v *Fitzgerald* [1906] 2 I R 254
[5] *Beetham* v *James* [1937] 1 K B 527
[6] *Speight* v *Oliviera* (1819) 2 Starkie 493
[7] *Shine* v *Archdeacon* [1931] I R 566 579
[8] *Evans* v *Walton* (1867) L R 2 C P 615
[9] *Terry* v *Hutchinson* (1868) L R 3 Q B 599

that is for the debauching of such child or servant. To support the action—

(1) There must be proof of actual or constructive service at the date of seduction.[1]

(2) The child or servant must have been rendered ill and incapable of rendering service in consequence of the seduction, apparently whether it did or did not result in pregnancy and confinement.[2]

Female children.—The foundation of the action by a father to recover damages against the wrong doer for the seduction of his daughter has been placed upon the loss of service of the daughter in which service he is supposed to have a legal right or interest.[3] The legal relationship of father and child does not by itself justify the maintenance of the action. The maintenance of the action is only justified by the legal fiction that a child living with the parent is a servant, and the action is maintainable where the daughter is under twenty-one years of age without any proof of actual services rendered, but after that age is passed there must be proof of either a contract of service or actual service,[4] such as making tea or milking cows.[5] Where actual services are rendered whatever their character and however personal to the mother, they are deemed to be rendered to the father and not to the mother, and are rendered to him not as the father but in his capacity as master of the house and home.[6] Thus seduction is not actionable *per se* but only when it results in an actual loss of service. The old form of pleading was *per quod servitium amisit* (whereby he lost the benefit of her service.[7])

The right of the father continues even though the child be in the service of another person for several hours of each day,[8] but it does not where that person has a right to the whole of the services of the child.[9]

A father can maintain an action of seduction but a mother cannot if seduction took place during the lifetime of the father who died without bringing the action.[10] Because the relation of master and servant exists in the father's lifetime exclusively between the father as head of his family and the daughter as his child and one of the family and one of the house-

[1] *Hedges* v. *Tagg* (1872) L. R. 7 Ex. 283; *Davies* v. *Williams* (1847) 10 Q. B. 725.

[2] *Manvell* v. *Thomson* (1826) 2 C. & P. 303; *Eager* v. *Grimwood* (1847) 1 Ex. 61.

[3] *Grinnell* v. *Wells* (1844) 7 M. & G. 1033, 1041; *Rist* v. *Faux* (1863) 4 B. & S. 409.

[4] Per Avory, J. in *Peters* v. *Jones* [1914] 2 K. B. 781.

[5] *Carr* v. *Clarke* (1818) 2 Chit. 260, 261; *Maunder* v. *Venn* (1829) Mood. & Mal. 323.

[6] *Beetham* v. *James* [1937] 1 K. B. 527, 530.

[7] *Evans* v. *Walton* (1867) L. R. 2 C. P. 615, 622.

[8] *Rist* v. *Faux*, sup.

[9] *Hedges* v. *Tagg*, sup.; *Whitbourn* v. *Williams* [1901] 2 K. B. 722; *Barnes* v. *Fox* [1914] 2 I. R. 276; *Shine* v. *Archdeacon* [1931] I. R. 366.

[10] *Hamilton* v. *Long* [1903] 2 I. R. 407; [1905] 2 I. R. 552; *Peters* v. *Jones* [1914] 2 K. B. 781.

hold which he maintained [1] As head of the family he was guardian of his daughter during minority and when he became adult so long as she resided under his protection in the family home he was regarded as master in respect of all services yielded to or for him in the course of family duty There is no trace of suggestion in English lawbooks that a mother during the father s lifetime could be regarded at common law as mistress jointly with her husband or separately She was merged in her husband

A person standing in the relation of a parent or in *loco parentis* is permitted to recover damages for an injury of this nature [3] e g a brother in the absence of the father [4] or a putative father even though he is not married to the girl s mother [5]

Female servants —In the case of a female servant a master can sue the person who seduces her and thus deprives him of her services The usual cause of this loss of service is pregnancy and child birth

If a man brings a girl into his own service in order to seduce her the relation of master and servant is not contracted between them and the girl s father can maintain an action for seduction [6]

Thus if the daughter or servant be in the actual service of a person other than the plaintiff at the time when the act is committed the action cannot be maintained and the minority of the debauched female makes no difference except in so far as that in the case of a minor daughter her parent s right to her services automatically revives upon the termination of any contract of service under which she may be temporarily employed [7]

Where the actual relation of master and servant subsists an action will lie for enticing away such servant without proof that the defendant debauched her [8]

Leading cases —TERRY v HUTCHINSON DEAN v PEEL

Seduction after dismissal from service —In the first leading case the plaintiff s daughter being under age left his house and went into service After nearly a month the master dismissed her at a day s notice and the next day on her way home to her father s house the defendant seduced her it was held that as soon as the real service was put an end to by the master whether rightfully or wrongfully the girl intending to return home the right of the father to her services revived, and there was therefore sufficient evidence of service to maintain an action for the seduction [9]

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8 *Evans* v *Walton* (1867) L. R 2 C P 615

9 *Terry* v *Hutchinson* (1868) L. R. 3 Q B 599

Seduction while in service —But where the daughter as in the second leading case though under age was acting as housekeeper to another person at the time of seduction and had no intention at the time of the seduction to return to her father s house though she afterwards did return there while within age in consequence of the seduction and was maintained by her father it was held that no action would lie [1]

Seduction of a married daughter —Where a married woman after separating from her husband lived with her father and acted as his servant it was held that he could maintain an action against a person by whom she was debauched. It was held similarly where she was deserted by her husband and was living with her father when seduced [3]

Employment with the object of seduction —The plaintiff s daughter a young girl living with him was hired by the defendant from the plaintiff with the object of employing her as a domestic servant and also seducing her It was held that the contract of service was invalid as against the plaintiff who brought an action of seduction [4]

Damages —In an action for seduction damages are always exemplary [5] The plaintiff is not confined to proof of loss of service only but may go into evidence of the loss of comfort in the security of her child and injury to her feelings as a parent.[6] The expenses incurred through the illness of the person seduced the distress and anxiety of the mind through which the parents have passed and the disgrace and dishonour which they have suffered are always taken as a matter of aggravation The situation in life of the parties is to be considered [8] The means of the defendant ought not to be inquired into or to affect the amount of damages [9] It is an aggravation that the seduction was effected under the guise of honourable addresses

Where the plaintiff is the master of the person seduced the measure of damages is the actual pecuniary loss to him [10]

MISCELLANEOUS RIGHTS

(1) Inducing a breach of contract —A violation of legal right committed knowingly is a cause of action and it is a violation of legal right to interfere with contractual relations recognized by law if there be no sufficient justification for interference [11] Procuring a breach of contract is

[1] *Dean* v *Peel* (1804) 5 East 45 The same result was reached where it appeared that she partly supported her father *Manley* v *Field* (1859) 29 L. J C P 79

[2] *Harper* v *Lufkin* (1827) 7 B & C. 387

[3] *Ram Lal* v *Tula Ram* (1881) 4 All 97

[4] *Flynn* v *Connell* [1919] 2 K. B 427

[5] *Irwin* v *Dearman* (1809) 11 East 23

[6] *Bedford* v *McKowl* (1800) 3 Esp 119

[7] *Terry* v *Hutchinson* (1868) L. R. 3 Q B 599 *Andrews* v *Askey* (1837) 8 C. & P 7 *Beetham* v *James* [1937] 1 K B 527

[8] *Andrews* v *Askey* sup.

[9] *Hodsoll* v *Taylor* (1873) L R 9 Q B 79

[10] *McKenzie* v *Hardinge* (1906) 23 T L. R. 65

[11] *Quinn* v *Leathem* [1901] A C. 495 510 *Glamorgan Coal Co* v *South Wales Miners Federation* [1903] 2 K. B 545 573 576

an actionable wrong unless there be justification for interfering with the legal right.[1]

The justification which will be sufficient to exonerate a person from liability for his interference with the contractual rights of another must be an equal or superior right in himself and it will not be sufficient for him to show that he acted *bona fide* or without malice, or in the best interests of himself or others or on a wrong understanding of his own rights nor even that he acted as an altruist seeking only the good of another and careless of his own advantage.

Section 3 of the Trade Disputes Act of 1906 creates an exception to the foregoing principles in cases of trade disputes It says An act done by a person *in contemplation or furtherance of a trade dispute shall not* be actionable on the ground only that it induces some other person to break a contract of employment, or that it is an interference with the trade business or employment of some other person The object of this section is to exempt those who instigate strikes from liability for breach of contractual rights of the employers By the Trade Disputes and Trade Unions Act 1927 this exemption does not apply to any acts done in contemplation or furtherance of a strike which is declared illegal by that Act[3] If there be threats or violence[4] or coercion[5] this section gives no protection for then there is some other ground of action besides the ground that it induces some other person to break a contract

Where the defendant the manager of a theatre induced a third party to break an engagement with the plaintiff the manager of a rival theatre to sing at his theatre it was held that the plaintiff was entitled to recover damages.[6] The miners employed at the collieries in South Wales without giving notice to their employers and in breach of their contracts with them abstained from working on certain days called stop days In so doing the miners acted under the direction or order of a federation of the miners given by their executive council The object of procuring this breach of contract was to keep up the price of coal upon which the amount of the miners wages depended In an action by the employers against the federation and its officers it was held that the defendants were liable in damages, there being no sufficient justification for their interference.[7]

Where an action was brought against the mother of a man who had promised to marry the plaintiff but who refused to marry her owing to certain false

[1] *South Wales Miners Federation* v *Glamorgan Coal Co Ltd* [1905] A C 239 *Pandurang Balaji* v *Nagu Dagdu* (1906) 8 Bom. L R 610

[2] *Read* v *Friendly Society of Operative Stonemasons etc* [1902] 2 K B 88 96 *Glamorgan Coal Co* v *South Wales Miners Federation* [1903] 2 K B 545 574 See *Sankaralinga Reddi* v *Kandasami Tevan* (1907) 30 Mad 413

[3] 17 & 18 Geo V c 22 s. 1 (4)

[4] See *Conway* v *Wade* [1909] A C 506 511

[5] *Valentine* v *Hyde* [1919] 2 Ch. 129

[6] *Lumley* v *Gye* (1853) 2 E & B 216 The principle of this decision has been criticised by Beaman J in *Khimji* v *Narsi* (1914) 17 Bom L R 225 39 Bom 682

[7] *South Wales Miners Federation* v *Glamorgan Coal Co* sup

TORTS TO PROPERTY

CHAPTER XVI

TORTS TO REALTY OR IMMOVABLE PROPERTY

TORTS affecting immovable property arise either by disturbance or usurpation of the right to hold or possess it whether such right be present or in expectation (e. g trespass dispossession) or by actual physical damage to the property (e. g waste) or by interference with or impairing of the enjoyment of it (e g nuisance)

Torts purely affecting real or immoveable property are —

1 Trespass
2 Trespass *ab initio*
3 Dispossession
4 Injury to reversionary rights
5 Waste.
6 Injury to natural rights and easements.

1 *Trespass*

Trespass in its widest sense, signifies any transgression or offence against the laws of nature of society or of the country whether relating to a man s person or to his property But the most obvious acts of trespass are—(1) trespass *quare clausum fregit* because he (the defendant) broke or entered into the close or land of the plaintiff and (2) trespass *de bonis asportatis* wrongful taking of chattels

Trespass to land is an unwarrantable entry upon the land of another or any direct and immediate act of interference with the possession of land

Trespass to land is also an offence under the Penal Code (s 441)

To constitute the wrong of trespass neither force nor unlawful intention nor actual damage nor the breaking of an enclosure is necessary Every invasion of private property be it ever so minute is a trespass [1]

Trespass may be committed (1) by entering upon the land of the plaintiff or (2) by remaining there or (3) by doing an act affecting the sole possession of the plaintiff

(1) Entry is essential to constitute a trespass

A man is not liable for a trespass committed involuntarily but he is liable if the entry is intentional even though made under a mistake e g if in mowing his own land one inadvertently allows his blade to cut through into his neighbour s field he is guilty of a trespass [2]

He who owns the surface of land owns all the underlying tra[illegible] Any entry beneath the surface at whatever depth is an actionable trespass

[1] *Entick* v *Carrington* (1765) 19 St Tr 1029

[2] *Basely* v *Clarkson* (1682) 3 Lev 37

If a person who has a limited right of entry upon land exceeds that right, he is a trespasser If a man use the land over which there is a right of way for any purpose, lawful or unlawful other than that of passing and re-passing he is a trespasser [1]

Excess of ordinary user of highway amounts to trespass —The plaintiff was possessed of land which was crossed by a highway A trainer of race horses had agreed with the plaintiff for the use of some of his land for the training and trial of race-horses. A view of the land so used could be obtained from the highway on the plaintiff s land The defendant a proprietor of a publication which gave accounts of the doings of race horses in training walked backwards and forwards on a portion of the highway on the plaintiff s land about fifteen yards in length for an hour and a half watching and taking notes of the trials of race horses on the plaintiff s land. In an action for trespass it was held that the defendant had exceeded the ordinary and reasonable user of a highway as such to which the public are entitled and was liable for trespass

(2) If a person who has lawfully entered on the land of another remains there after his right of entry has ceased he commits trespass

(3) Every interference with the land of another e g throwing stones or materials over a neighbour s lands is deemed constructive entry and amounts to trespass

A trespass may be committed by driving a nail into a person s wall [3] or by placing anything against his wall [4] or by shooting over his land [5] or by placing anything above and overhanging his land [6] or by planting trees in his land [7] The owner of land is entitled to the column of his space above the surface *ad infinitum* An ordinary proprietor of land can cut and remove a wire placed at any height above his land [8]

Aerial trespass —In virtue of Air Navigation Act 1920 [9] no action shall lie in respect of trespass or in respect of nuisance by reason only of the flight of air craft over any property provided it is at a reasonable height having regard to all the circumstances If material damage is caused by an air craft in flight taking off or landing or by any person in such air craft or by any article falling from such air-craft to any person or property on land or water damages shall be recoverable from the owner of the air craft without proof of negligence or intention unless he has *bona fide* hired

[1] *Dovaston* v *Payne* (1795) 2 H Bl 528 *Harrison* v *Duke of Rutland* [1893] 1 Q B 142

[2] *Hickman* v *Maisey* [1900] 1 Q B 752

[3] *Lawrence* v *Obee* (1815) 1 Stark 22

[4] *Gregory* v *Piper* (1829) 9 B & C 591

[5] *Pickering* v *Rudd* (1815) 1 Stark 56 58 *Paul* v *Summerhayes* (1878) 4 Q B D 9

[6] *Corbett* v *Hill* (1870) L R 9 Eq 671 The projecting of a cornice over another s land amounts to trespass *Ramasubbier* v *Shenbagaratnam* (1926) 25 L W 154

[7] *Muhammad Shafi* v *Bindeshari Sharan Singh* (1923) 46 All. 52 The owner of land can sue for removal of trees and for recovery of possession of the land at any time within twelve years *ibid*

[8] *Wandsworth Board of Works* v *United Telephone Co* (1884) 13 Q B D 904 927

[9] 10 & 11 Geo V c. 80 s. 9

the machine for more than fourteen days without the assistance of his servants He has a right of indemnity against the actual wrong doer

There is also the Indian Aircraft Act[1] s 17 of which provides that no suit shall be brought in respect of trespass or nuisance by reason only of the flight of air-craft over any property at a height above the ground which having regard to wind weather and all the circumstances of the case is reasonable or by reason only of the ordinary incidents of such flight But whoever wilfully flies so as to cause damage to person or property may be punished with imprisonment for six months or a fine of Rs 1 000 or with both In view of this Act there is no civil liability unless the plaintiff establishes intention or negligence on the part of the person causing damage

Continuing trespass —Every continuance of a trespass is a fresh trespass and an action may be brought in respect of it The continuing of a trespass from day to day is considered in law a separate trespass on each day If a man throws a heap of stones or builds a wall or plants posts of rails on his neighbour's land and there leaves them an action will lie against him for the trespass and the right to sue will continue from day to day till the incumbrance is removed An action may be brought for the original trespass in placing the incumbrance on the land and another action for continuing the things so erected A recovery of damages in the first action by way of satisfaction does not operate as purchase of the right to continue the injury[2] A new occupier entering upon premises on which there is a continuing trespass has a cause of action in trespass in respect of it[3]

Trespass by joint owners —Joint tenants or tenants in common can only sue one another in trespass for acts done by one inconsistent with the rights of the other[4] Such acts are for example destruction of a building[5] or chattel carrying away of soil[6] or expulsion of the other or his servant off the land or out of the house holden in common[7]

A Court will not interfere where a tenant in common acts reasonably for the purpose of enjoying the property held in common in any way in which an owner can enjoy such property without injury to his coparcener but the case is different where there has been a direct infringement of a clear and distinct right.[8]

1 Act XXII of 1934
2 *Holmes v Wilson* (1839) 10 Ad & E 503
3 *Konskier v B Goodman Ltd* [1928] 1 K B 421
4 *Jacobs v Seward* (1872) L R 5 H L 464 See *Mahesh Narain v Nowbat Pathak* (1905) 32 Cal 837 *Baaram Gutta v Shyama Charan* (1900) 21 C W N 1057 *Harsukh Rai v Darshan Singh* (1931) 33 P L R 93
5 *Cresswell v Hedges* (1862) 31 L J Ex 497
6 *Wilkinson v Haygarth* (1847) 12 Q B 837
7 *Murray v Hall* (1849) 7 C B 441
8 *Copee Kishen v Hem Chunder* (1870) 13 W R 322 The Court accordingly granted an injunction preventing a tenant in-common from erecting a building on the common property without the consent of his co-sharers (*Durgpal v Bhonda Rai* (1867) 2 Agra 311 *Mehdee Hossein*

Where a joint-owner or co-sharer has erected a building on joint land the Court can order its demolition[1] But where the act complained of is not proved to be destructive of or detrimental to the enjoyment of the joint property the Court will refuse to order its demolition[2] Where a co-sharer makes construction upon common land it is not necessary for a co-sharer who has not acquiesced in such construction to prove special damage[3]

Trespass by cattle —Trespass by a man s cattle is dealt with similarly to trespass committed by himself If a man s cattle sheep or poultry or any animal in which the law gives him a valuable property trespass on another s close, the owner of the animal is responsible for the trespass and consequential damage unless he can show that his neighbour was bound to fence and had failed so to do[4] But if no such duty exists the owner

v *Aujud Ali* (1874) 6 N W P 259 *Gooroodoss* v *Bejoy Gobind* (1868) 1 Beng L R (A C J) 108 10 W R 171 *Hollowav* v *Sheikh Wahed Ali* (1871) 12 Beng L R 191n 16 W R 140 *Sheopersad* v *Leela Singh* (1873) 12 Beng L R 188 20 W R 160 *Shadi* v *Anup Singh* (1889) 12 All 436 F B *Najju Khan* v *Imtiaz ud din* (1895) 18 All 115 *Muhammad Ali* v *Fai Bakhsh* (1896) 18 All 361) or from erecting a *naubuth khana* or a scaffolding supporting a platform (*Ranjerdro Lall* v *Shama Churn* (1879) 5 Cal 188) or from erecting an overhanging structure over a joint lane (*Hans Raj* v *Jagat Singh*) (1937) 39 P L R 875 or from planting indigo (*Stalkartt* v *Gopal Pan day* (1873) 12 B ng L R 197 20 W R 168 *Lloyd* v *Sogra* (1876) 25 W R 313 *Debee Pershad* v *Gujadur* (1876) 25 W R 374 *Hollowav* v *Muddon Mohun* (1882) 8 Cal 466) on Ijmali lands (*Crowdee* v *Bhekdhari* (1871) 8 Beng L R (App) 45 *Crowdy* v *Inder Roy* (1872) 18 W R 408 *Hunooman Singh* v *Crowdie* (1875) 23 W R 428 *Watson & Co* v *Ramchund* (1890) 18 Cal 10)

[1] *Buru Das* v *Bijaya Gobinda* (1868) 1 Beng L R 108 10 W R 171 *Bissambur Shaha* v *Shib Chun der* (18 4) 22 W R 286 *Rajendro Lall* v *Shama Churn* (1879) 5 Cal 188 *Shadi* v *Anup Singh* sup *Kan kayya* v *Narasimhulu* (1895) 19 Mad 38

[2] *Lala Bisuambharlal* v *Rajaran* (1869) 3 Beng L R (App) 67 13 W R 337n where a joint owner was allowed to erect a wall upon the joint property without the consent of the co-owner as there was no evidence of injury to the co-owner Similarly the Court did not under like conditions interfere to prevent a joint owner from erecting a hut or challa (*Nobin Chan dra* v *Mahes Chandra* (1869) 3 Beng L R (App) 111) or from erecting a building (*Dwarkanath* v *Goopeenath* (1871) 12 Beng L R 189n 16 W R 10 *Massim Mollah* v *Panjoo Chora mee* (1874) 21 W R 373 *Doorga Lall* v *Lala Hulwant* (1876) 25 W R 306 *Nocury* v *Bindabun* (1882) 8 Cal 708 *Paras Ram* v *Sher jit* (1887) 9 All 661) or from building a jute factory on lands which were agricultural and horticultural (*Shamnugger Jute Factory Co* v *Ram Narain Chatterjee* (1886) 14 Cal 189) or from planting a garden (*Sri Chand* v *Nim Chand* (1870) 5 Beng L R (App) 25 13 W R 337) or from excavating a tank in agricultural lands (*Joy Chunder* v *Bippro Churn* (1886) 14 Cal 236) or from digging a tank and building a schoolroom and manufacturing bricks (*Mohima Chun der* v *Madhub Chunder* (1875) 24 W R 80)

[3] *Ram Bahadur Pal* v *Ram Shan ker* (1905) 2 A L J 455 But see *Ananda Chandra* v *Parbati Nath* (1906) 4 C L J 198 where it is said that substantial injury should be proved by the plaintiff

[4] *Ellis* v *Loftus Iron Co* (1874) L R 10 C P 10 13 *Sagril* v *Mele tard* (1443) Y B 21 Hen VI p 33 *Cox* v *Burbidge* (1863) 13 C B N S 430

of cattle is liable for their trespasses even upon unenclosed land[1] an for all naturally resulting damage

Injury by a horse —Where the defendant s horse injured the plaintiff s ma by biting and kicking her through an iron fence belonging to the defendan which separated the defendant s land from the plaintiff s it was held that ther was a trespass by the act of the defendant s horse for which the defendant wa liable apart from any question of negligence[3]

Damage by diseased cattle —Where cattle affected with a contagious disord trespassed upon an adjoining pasture and infected other cattle there with th disease it was held that the owner of the trespassing beasts was responsible fo the damage arising from the spread of the disorder as well as for the injury t the grass and herbage[4]

REMEDIES

The person whose land is trespassed upon may—

(1) bring an action for trespass against the wrong doer or
(2) forcibly defend his possession against a trespasser or
(3) forcibly eject him.

(1) Action —To maintain an action for trespass the plaintiff mus prove that he was in possession either actual or constructive at the tim of trespass[5] Any possession is a legal possession against a wrong doer[6]

A party having a right to the land acquires by entry the lawful posses sion of it and may maintain trespass against any person who being in possession at the time of his entry wrongfully continues upon the land When once there is an entry by the person having title the Court look to the date when the title accrued and considers him in possession from that time[8] Upon his entry his possession relates back to the date at which his legal right to enter first accrued and he can maintain an action for trespass committed prior to his entry[9]

An apprehended trespass furnishes no ground of action[10]

[1] *Boyle v Tamlyn* (1827) 6 B & C. 329 *Moidin Kutti v Koman Nair* (1912) 12 M L. T 538
[2] *Sreehuree Roy v James Hill* (1868) 9 W R 156
[3] *Ellis v Loftus Iron Co* (1874) L. R 10 C. P 10
[4] *Anderson v Buckton* (1815) 1 Str 192
[5] *Wallis v Hands* [1893] 2 Ch 75 *Midnapur Zamindari Co v Ram Kanai Singh* (1925) 5 Pat 80
[6] *Graham v Peat* (1801) 1 East 244 *Harker v Birkbeck* (1764) 3 Burr 1556 *Catteris v Cowper* (1812) 4 Taunt. 547
[7] *Butcher v Butcher* (1827) 7 B & C. 399 402
[8] *Anderson v Radcliffe* (1860) 2 L. J Q B 128.
[9] *Barnett v Earl of Guilford* (1855) 11 Ex 19
[10] *Jarum Sookh v Seeta Ram* (1867) 2 Agra 119 *Giblon v Abdul Rahman* (1869) 3 Beng L. R. (A C J) 411 *Poorun Chand v Pareshnath* (1869) 12 W R 82

When a person who is *prima facie* liable to another on being sued by him sets up a defence that the paramount title is vested in a third person he is said to set up the *jus tertii* (right of a third person) The general rule is that a wrong-doer cannot set up the *jus tertii* the right of possession outstanding in some third person as against the fact of possession in the plaintiff[1] If the defendant justifies his trespass on the ground that his act was committed by the authority of the true owner and thereby sets up *jus tertii* such authority is traversable by the plaintiff in which case the defendant must prove that such authority was given in fact[2]

Indian law—The foundation of trespass is the doing of an illegal act forcibly and without legal authority as against the property of another The illegality and the wrongfulness of the act must be established by proof[3] The law of England that a landlord who has parted with his possession to a tenant cannot sue in trespass for damage to the property unless the wrongful act complained of imports a damage to the reversionary interests does not apply to landlords in India[4] Any one of several joint tenants of land may sue to eject a trespasser The consent of one joint tenant to the possession of a trespasser does not make him the less a trespasser with regard to other joint tenants[5]

(2) Defence—The person in possession may use force to keep out a trespasser but if the trespasser has succeeded in obtaining possession the rightful owner must appeal to the law for assistance

(3) Expulsion—A mere trespasser cannot by the very act of trespass immediately and without acquiescence give himself what the law understands by possession against the person whom he ejects and drive him to produce his title if he can without delay reinstate himself in his former possession[6] The rightful owner of property is entitled to use force in ejecting a trespasser so long as he does him no personal injury[7] He must not resort to violence[8]

1 *Nicholls v Ely Beet Sugar Factory* [1931] 2 Ch 84 *Braham v Peat* (1801) 1 East 244 *Chambers v Donaldson* (1809) 11 East 65 See *Somiammal v Vellaya Sethurayan* (1915) 29 M L J 233

3 *Danai Das v Govinda Gedi* (1916) 1 P L J 533 *Norendra Nath Koer v Bhusan Chandra Pal* (1920) 31 C L J 495

4 *Venakatachalam v Andiappan* (1879) 2 Mad 232 *Dheermoney v Croft* (1865) 3 W R (S C REF) 20 *Monindro v Muneerooddeen* (1873) 20 W R 230 11 Beng L R (App) 40 *Ram Chandra v Jiban Chandra* (1868) 1 Beng L R (A C J) 203 In a suit for possession by one trespasser on Government land against another the one who has paid Government revenue on the land has a better title than the one who has never paid any revenue *Tun Aung v Ma Htee* (1918) 12 B L T 263

5 *Teeluk v Ramjus* (1873) 5 N W P 182 *Lutchmun v Dabee* (1868) 3 Agra 264 *Ghunshyam v Runjeet* (1865) 4 W R (ACT X) 39 contra *Luchmun v Seami* (1866) 5 W R (ACT X) 93

6 *Browne v Dawson* (1840) 12 Ad & E 624 629

7 *Scott v Mathew Brown & Co* (1885) 51 L T 746

8 *Edwick v Hawkes* (1881) 18 Ch D 199

of cattle is liable for their trespasses even upon unenclosed land[1] and for all naturally resulting damage[2]

Injury by a horse—Where the defendant s horse injured the plaintiff s mare by biting and kicking her through an iron fence belonging to the defendant which separated the defendant s land from the plaintiff s it was held that there was a trespass by the act of the defendant s horse for which the defendant was liable apart from any question of negligence[3]

Damage by diseased cattle—Where cattle affected with a contagious disorder trespassed upon an adjoining pasture and infected other cattle there with the disease it was held that the owner of the trespassing beasts was responsible for the damage arising from the spread of the disorder as well as for the injury to the grass and herbage[4]

REMEDIES

The person whose land is trespassed upon may—

(1) bring an action for trespass against the wrong doer or
(2) forcibly defend his possession against a trespasser or
(3) forcibly eject him

(1) Action—To maintain an action for trespass the plaintiff must prove that he was in possession either actual or constructive at the time of trespass[6] Any possession is a legal possession against a wrong doer[6]

A party having a right to the land acquires by entry the lawful possession of it and may maintain trespass against any person who being in possession at the time of his entry wrongfully continues upon the land[7] When once there is an entry by the person having title the Court looks to the date when the title accrued and considers him in possession from that time[8] Upon his entry his possession relates back to the date at which his legal right to enter first accrued and he can maintain an action for trespass committed prior to his entry[9]

An apprehended trespass furnishes no ground of action[10]

[1] *Boyle* v *Tamlyn* (1827) 6 B & C 329 *Moidin Kutti* v *Koman Nair* (1912) 12 M L T 538

[2] *Sreehuree Roy* v *James Hill* (1868) 9 W R 156

[3] *Ellis* v *Loftus Iron Co* (1874) L R 10 C P 10

[4] *Anderson* v *Buckton* (1815) 1 Str 192

[5] *Wallis* v *Hands* [1893] 2 Ch 75 *Midnapur Zamindari Co* v *Ram Nanai Singh* (1925) 5 Pat 80

[6] *Graham* v *Peat* (1801) 1 East 244 *Harker* v *Birkbeck* (1764) 3 Burr 1556 *Catteris* v *Cowper* (1812) 4 Taunt. 547

[7] *Butcher* v *Butcher* (1827) 7 B & C 399 402

[8] *Anderson* v *Radcliffe* (1860) 29 L J Q B 128

[9] *Barnett* v *Earl of Guilford* (1855) 11 Ex 19

[10] *Parum Sookh* v *Seeta Ram* (1867) 2 Agra 119 *Gibbon* v *Abdur Rahman* (1869) 3 Beng L R (A C J) 411 *Poorun Chand* v *Paresh nath* (1869) 12 W R 82

When a person who is *prima facie* liable to another on being sued by him, sets up a defence that the paramount title is vested in a third person he is said to set up the *jus tertii* (right of a third person) The general rule is that a wrong doer cannot set up the *jus tertii* the right of possession outstanding in some third person as against the fact of possession in the plaintiff[1] If the defendant justifies his trespass on the ground that his act was committed by the authority of the true owner and thereby sets up *jus tertii* such authority is traversable by the plaintiff in which case the defendant must prove that such authority was given in fact[2]

Indian law —The foundation of trespass is the doing of an illegal act forcibly and without legal authority as against the property of another The illegality and the wrongfulness of the act must be established by proof[3] The law of England that a landlord who has parted with his possession to a tenant cannot sue in trespass for damage to the property unless the wrongful act complained of imports a damage to the reversionary interests does not apply to landlords in India[4] Any one of several joint tenants of land may sue to eject a trespasser The consent of one joint tenant to the possession of a trespasser does not make him the less a trespasser with regard to other joint tenants[5]

(2) Defence —The person in possession may use force to keep out a trespasser but if the trespasser has succeeded in obtaining possession the rightful owner must appeal to the law for assistance

(3) Expulsion —A mere trespasser cannot by the very act of trespass immediately and without acquiescence give himself what the law understands by possession against the person whom he ejects and drive him to produce his title, if he can without delay reinstate himself in his former possession[6] The rightful owner of property is entitled to use force in ejecting a trespasser so long as he does him no personal injury[7] He must not resort to violence[8]

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3 *Danai Das v Govinda Gedi* (1916) 1 P L J 533 *Norendra Nath Koer v Bhusan Chandra Pal* (1920) 31 C L J 495

4 *Venakatachalam v Andiappan* (1879) 2 Mad 232 *Dheermoney v Croft* (1865) 3 W R (S C REF) 20 *Monindro v Muneerooddeen* (1873) 20 W R 230 11 Beng L R (App) 40 *Ram Chandra v Jiban Chandra* (1868) 1 Beng L R (A C J) 203 In a suit for possession by one trespasser on Government land against another the one who has paid Government revenue on the land has a better title than the one who has never paid any revenue *Tun Aung v Ma Htee* (1918) 12 B L T 263

5 *Teeluk v Ramjus* (1873) 5 N W P 182 *Lutchmun v Dabee* (1868) 3 Agra 264 *Ghunshyam v Runjeet* (1865) 4 W R (ACT X) 39 contra *Luchmun v Seami* (1866) 5 W R (ACT X) 93

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7 *Scott v Mathew Brown & Co* (1885) 51 L T 746

8 *Edwick v Hawkes* (1881) 18 Ch D 199

DEFENCES

The justifications or defences to an action for trespass are —

1 Prescription	4 Act of necessity
2 Leave and license	5 Self defence
3 Authority of law	6 Re entry on land.
(*a*) Execution of legal process	7 Retaking of goods or cattle
(*b*) Distress	8 Abating a nuisance
(*c*) Distress *damage feasant*	9 Special property or easement

1 *Prescription*

A defendant may plead that he was justified by reason of prescription as by showing a right of common or right of way over the land or that his right of way was wrongfully obstructed by the plaintiff and the trespass was necessary to avoid it [1]

2 *Leave and license*

A license only makes an action lawful which without it would be unlawful [2] It may be expressed or implied such as entry into a shop or a public house. If the defendant relies upon a plea of leave and license he must prove either an express permission from the plaintiff to the defendant to come upon the land or circumstances from which such permission may fairly be implied [3] As to licenses see the Indian Easements Act 1882 ss 52 64

At common law a license was revocable at will by the licensor even if it was for a fixed term. Any act done after the revocation of the license cannot be justified [4] This principle has now no application owing to the fusion of law and equity by the Judicature Act 1873 [5] A license granted for a specific period cannot be revoked as the Court will prevent premature revocation by an injunction Where the plaintiff who had purchased a ticket for a seat at a cinema show was forcibly turned out of his seat by the manager under a mistaken impression that he had not paid for his ticket it was held that the plaintiff was entitled to recover substantial damages [6] This case establishes (*a*) that the purchaser of a ticket for a seat at a theatre has a right to enter and stay and witness the whole performance provided that he behaves properly and complies with the rules of the management and (*b*) that the license granted by the sale of the ticket includes a contract not to revoke the license arbitrarily [7]

[1] *Marshall* v *The Ullesuater Steam Navigation Co* (1871) L. R 8 Q B 166 *Bourke* v *Davis* (1889) 44 Ch D 110

[2] *Thomas* v *Sorrell* (1674) Vaug 330

[3] *Ditcham* v *Bond* (1814) 3 Camp 524

[4] *Wood* v *Leadbitter* (1845) 13 M & W 838

[5] 36 & 37 Vic c. 66 s. 25 (1)

[6] *Hurst* v *Picture Theatres Limited* [1915] 1 K B 1

[7] *Said* v *Butt* [1920] 3 K. B 497

3 Authority of law

(*a*) Execution of legal process—Entry under a legal process is justifiable[1] *Semayne s case*[2] which is a leading authority on this subject lays down the following points —

1 That the hou e of every one is to him as his castle and fortress a well for his defence against injury and violence as for his repose

2 When any house is recovered by any real action the sheriff may break the hou e and deliver the seisin or possession to the defendant or plaintiff

3 In all cases when the King is party the sheriff may break the party s house, either to arrest him, or to do other execution of the King s process if otherwise he cannot enter But before he breaks it he ought to signify the cause of his coming and to make request to open the doors

4 In all cases when the door is open the sheriff may enter the house and do execution, at the suit of any subject either of the body, or of the goods But it is not lawful for the sheriff at the suit of a common person to break the defendant s house, &c to execute any process at the suit of any subject

5 The house of any one is only a privilege for himself and his family and his goods and does not extend to protect any person who flies to his house or the goods of any other which are brought there.

An officer[3] cannot break the outer door without a demand but after he has entered the house in which the person or the goods of the defendant are contained he may break open any door within the house without any further demand If the officer is forcibly ejected after he has peaceably obtained entrance by the outer door he may break open the door to re enter[4]

Indian law—As regards the first point established in *Semayne s* case there is little doubt that the law in India is in accordance with the law laid down there If a bailiff break the doors of a third person in order to execute a decree against a judgment debtor he is a trespasser if it turn out that the person or goods of the debtor are not in the house.[5] A *na ar* or sheriff cannot break open a defendant s dwelling house to execute civil process against his person or goods if the outer door is closed and locked even when he finds that the defendant has absconded to evade such execution The privilege extends to a man s dwelling house, or out house or any office annexed to the dwelling house but not to a building

[1] *Crouther* v *Ramsbottom* (1798) 7 T R. 654

[2] (1604) 5 Coke 91 1 Sm L C 104

[3] *Hutchinson* v *Birch* (1812) 4 Taunt 619 *Ratcliffe* v *Burton* (1802) 3 B & P 223 commented upon *Lee* v *Gansel* (1774) 1 Cowp 1 *Lloyd* v *Sandilands* (1818) 8 Taunt 250

[4] *Eagleton* v *Gutteridge* (1834) 11 M & W 465 *Pugh* v *Griffith* (1838) 7 A & E 827 *Aga Kurboolie Mahomed* v *The Queen* (1843) 4 M P C 239

[5] Per Melvill J., in *Dadabhai* v *The Sub Collector of Broach* (1870) 7 B H C (A C J) 82 85

standing at a distance from the dwelling house and not forming parcel of it [1] nor to his workshop [2]

Leading case—SEMAYNE v GRESHAM

In this case two men B and G lived together in a house at Blackfriars as joint tenants B contracted heavy debts and one of the largest and pressing of his creditors was Semayne to whom he acknowledged a recognizance in the nature of a Statute staple. In these circumstances B died and by right of survivorship the ownership of the house became vested in G In that house were diverse goods of B and to these in virtue of the Statute staple Semayne not unreasonably considered himself entitled Accordingly he instructed the sheriffs of London to do the best for him and these persons, armed with a proper writ set off for Blackfriars But when they came to the house G who had come to know of this shut the door in their faces whereby they could not come and extend the same goods, disturbing the execution In an action brought by Semayne it was held that G had done nothing wrong in locking the front door and that even when the King is a party the householder must be requested to open the door before the sheriff can break his way in [3]

(*b*) Distress —A distress is a remedy for the performance of a duty or the satisfaction of a demand which consists in the taking without legal process of a personal chattel from the possession of the defaulter into the hands of the party grieved as a pledge for the performance or satisfaction required with a power in case of continued default to sell the thing taken in compensation for the damage sustained [4] It is one of the most ancient and effectual remedies for the recovery of rent As between landlord and tenant any rent reserved by demise and in arrear may be recovered by distress upon any goods or chattel found upon the demised premises without previous demand being made

(*c*) Distress damage feasant is a remedy by which if cattle or other things be on a man s land encumbering it or otherwise doing damage there he may summarily seize them without legal process and retain them impounded as a pledge for the redress of the injury he has sustained [5] Anything animate, or inanimate which is wrongfully on the land of another and is doing damage may be distrained for such damage For instance, greyhounds or ferrets chasing and killing rabbits in a warren may be distrained *damage feasant* A locomotive was distrained where it was used on a railway line of a company without a certificate of the company as required by a statute.[6] This right is founded on the principle of recompense which justifies a person in retaining that which occasions injury to his property till amends be made by the owner The right does not give any right of sale It can be exercised only by a person who has a

[1] *Bai Kuvar* v *Bemdas* (1871) 8 B H C (A C J) 127 *Sodamini Dasi* v *Jageswar* (1871) 5 Beng L R (App) 27 *Damodar* v *Ishvar* (1878) 3 Bom. 89

[2] *Hodder* v *Williams* [1895] 2 Q B 663

[3] *Semayne* v *Gresham* (1604) 5 Coke 91

[4] Bullen 16

[5] *Ibid* p 227

[6] *Ambergate N & B Jun Ry* v *Midland Ry* (1853) 2 El & Bl 793

sufficient possession of land to entitle him to maintain an action of trespass The distress must be taken at the time the damage is done for if the damage was done yesterday and the distress taken to-day that would be illegal[1] If therefore a man coming to distrain beasts *damage feasant* sees the beasts on his ground and the owner of the beasts or his servant chases them out to prevent the distress he cannot distrain them

For *damage feasant* one may even distrain in the night but a distress for rent can be made during day only

Indian law —It may be doubted if the right of distress *damage feasant* would be held to exist except under express law in this country But there is a special enactment namely the Cattle Trespass Act[2] which contains special provisions regarding the impounding of cattle taken trespassing and doing damage

4 *Acts of necessity*

Entry on the land of another person without his consent is justifiable on the ground of necessity e g putting out fires[3] for public safety defence of the realm etc

5 *Self defence*

A trespass may be excused as having been done in self defence or in defence of a man s goods chattels or animals

6 *Re entry on land*

A person who is wrongfully dispossessed of land may retake possession of it if he can do so peaceably and without the use of force He will not be liable in an action for trespass to land[4] Even if he enters forcibly he is not liable[5] But Sta 5 Rich II c 7 created forcible entry an offence under it But so far as the civil rights of the parties are concerned the possession of a rightful owner gained by forcible entry is lawful as between the parties If an owner of landed property finds a trespasser on his premises he may enter the premises and turn the trespasser out, using no more force than is necessary to expel him without having to pay damages for the force used[6] He may be punished for breach of the peace but he is not liable civilly

Indian law —Under the Specific Relief Act[7] and in the Presidency

[1] *Wormer* v *Biggs* (1845) 2 C & K 31

[2] Act I of 1871

[3] *Cope* v *Sharpe* [1912] 1 K B 496

[4] *Taunton* v *Costar* (1797) 7 T R. 431 *Browne* v *Dawson* (1840) 12 A & E 624 *Delaney* v *Fox* (1856) 1 C. B N S 166 *Jones* v *Foley* [1891] 1 Q B 730

[5] *Turner* v *Meymott* (1823) 1 Bing 158 *Davison* v *Wilson* (1848) 11 Q B 890 *Wright* v *Burroughs* (1846) 3 C B 685

[6] *Hemmings* v *Stoke Poges Golf Club Ltd* [1920] 1 K B 720 738 overruling *Newton* v *Harland* (1840) 1 Man & G 644 *Beddall* v *Maitland* (1881) 17 Ch D 174 *Edwick* v *Hawkes* (1881) 18 Ch D 199

[7] I of 1877 s 9

of Bombay under the Bombay Mamlatdars Courts Act[1] if one in possession of immovable property is dispossessed otherwise than by course of law he may within six months sue to recover possession without reference to any title set up by another which is left to be determined in a separate action

The Indian Legislature has provided for the summary removal of any one who dispossesses another whether peaceably or otherwise than by due course of law but subject to such provision there is no reason for holding that the rightful owner so dispossessing the other is a trespasser and may not rely for the support of his possession on the title vested in him as he clearly may do by English law[2]

7 *Re taking of goods and chattels*

If a person takes away the goods of another upon his own land he gives to the owner of them an implied license to enter for the purpose of recaption[3] Similarly if the goods are on the land of another in pursuance of a felonious act of a third person the entry will be justifiable[4] But it will be otherwise if the goods or chattels are on the land of another owing to some negligent or wrongful act of the owner himself[5]

8 *Abating a nuisance*

Abatement that is removal of the nuisance by the party injured must be—

(1) peaceable

(2) without danger to life or limb and

(3) after notice to remove the same if it is necessary to enter another s land to abate a nuisance or where the nuisance is a dwelling house in actual occupation on a common unless it is unsafe to wait

Thus the occupier of land may cut off the overhanging branches of his neighbour s trees or sever roots which have spread from these trees into his own land[6] But he cannot cut the branches if the tree stands on the lands of both parties[7]

Under the Indian Easements Act the dominant owner cannot himself abate a wrongful obstruction of an easement[8]

[1] Bom. Act II of 1906 s. 5 cl (z)

[2] Per Sargent C J in *Bandu* v *Naba* (1890) 15 Bom 238 241 *Lillu* v *Annaji* (1881) 5 Bom 387 *Hillaya Subbaya* v *Narayanappa* (1911) 13 Bom L R 1200

[3] *Patrick* v *Colerick* (1838) 3 M & W 483 Viner s Abridg Trespass (1) *a*

[4] *Anthony* v *Haneys* (1832) 8 Bing 186

[5] *Ibid*

[6] *Lemmon* v *Webb* [1895] A C 1 *Smith* v *Giddy* [1904] 2 K B 448 *Hari Krishna* v *Shankar Vithal* (1894) 19 Bom 420 *Vishnu* v *Vasudeo* (1918) 20 Bom L R 826 *Putraya* v *Krishna Gota* (1934) 40 L W 639 *Arumugha Goundan* v *Rangaswami Goundan* (1938) 47 L W 324 See Ch XXI Nuisance Remedies.

[7] *Someshwar* v *Chunilal* (1919) 22 Bom L R 790

[8] Section 36 (Act V of 1882)

9 *Special property or easement*

The grantee of an easement may enter upon the servient tenement in order to do necessary repairs etc

Damages —In an action for injury to land the measure of damages is the diminished value of the property[1] or of the plaintiff s interest in it and not the sum which it would take to restore it to its original state The same act may give rise to different injuries the tenant may sue for the injuries to his possession and the landlord for the injuries to his reversion[2] The claim for damages includes not merely damages for unlawful entry but also damages for the mischief which the trespasser commits after entry[3]

And so where several persons are entitled in succession as tenant for life in tail in fee, each can only recover damages commensurate with the injury done to their respective estates[4] Damages vary according to a party s interest in land[5]

Acts of insult and malice are matters of aggravation for which substantial or exemplary damages would be given[6] The owner out of possession can sue the trespasser for mesne profits without suing for possession[7] Damages awardable against a wilful trespasser ought not to be less than the amount which the trespasser would have had to pay for the use and occupation of the land[8]

2 *Trespass* ab initio

When entry authority or license is given to any one by law and he abuses it he becomes a trespasser *ab initio* that is the authority or justification is not only determined but treated as if it had never existed His misconduct relates back so as to make his original act tortious The rule rests upon this—that the subsequent illegality shows the party to have contemplated an illegality all along so that the whole becomes a trespass

1 See *Whitwham* v *Westminster Brymbo Coal & Coke* [1896] 2 Ch 538

2 *Jefferson* v *Jefferson* (1683) 3 Lev 130 See *Beramji* v *The Secretary of State for India* (1887) P J 205

3 *Panna Lal Ghose* v *The Adjai Coal Co Ltd* (1926) 31 C W N 82

4 *Evelyn* v *Raddish* (1817) Holt N P 543

5 *Burma Railways Co Ltd* v *Maung Hla Tin* (1927) 5 Ran 813 In this case the Court held that a lessee from Government who has only grazing and cultivation rights over a piece of land and is not entitled to extract any minerals or earth therefrom cannot claim the value of any earth removed and can only claim damages for deprivation of the use of part of the surface of the earth i e. the diminution in the value of his land

6 *Sreehuree Roy* v *James Hill* (1868) 9 W R 156 *Ramaswami Chettiar* v *Suppiah Chettiar* (1935) 69 M L J 98 42 L W 404 [1935] M W N 868 If defendant persists in fighting when he knows or ought to know that he is wrong the Court will grant substantial damages *Soha Lal* v *Amba Prasad* (1922) 20 A. L J 888

7 *Dyamoyee Dayee* v *Mohdoo Soodun* (1865) 3 W R 147

8 *Ramaswami Nayakar* v *Meenakshisundaram Chettiar* (1924) 47 M L J 922

In the leading case of *Six Carpenters*[1] it is said "The law gives authority to enter into a common inn or tavern, so to the lord to distrain; to the owner of the ground to distrain *damage feasant*; to him in reversion to see if waste be done; to the commoner to enter upon the land to see his cattle; and such like. But if he who enters into the inn or tavern doth a trespass, as if he carries away any thing; or if the lord who distrains for rent, or the owner for *damage feasant*, works or kills the distress; or if he who enters to see waste breaks the house, or stays there all night; or if the commoner cuts down a tree; in these and the like cases the law adjudges that he entered for that purpose; and because the act which demonstrates it is a trespass he shall be a trespasser *ab initio*."

Where authority is not given by law but by the party and abused, then the person abusing such authority is not a trespasser *ab initio*. The reason of the difference being that in the case of a general authority or license of law the law adjudges by the subsequent act the intention with which the trespasser entered; but when the party gives an authority or license himself to do anything, he cannot for any subsequent cause punish that which is done by his own authority or license. Besides when the authority is conferred by an individual it can be limited or recalled at will, whereas the rights given by law require to be strictly protected.

The act by which a person is to be deemed a trespasser *ab initio* must of itself be a trespass.[2]

The leading case of *Six Carpenters*[3] lays down three points—

(1) That if a man abuse an authority given to him by the law he becomes a trespasser *ab initio*.

(2) That in an action of trespass if the authority be pleaded the subsequent abuse may be replied.

(3) That a mere non-feasance does not amount to such an abuse as renders a man a trespasser *ab initio*.

The Calcutta High Court has held that where there is an authority given by law for doing an act there an abuse may (not necessarily must) turn the act into a trespass *ab initio*. If a police-officer whilst lawfully conducting a search assaults some person on the premises his entry on the premises does not necessarily become unlawful from the outset.[4] Similarly, if police-officers enter the premises for a lawful arrest and afterwards seize books, papers and money which could not be lawfully seized they do not become trespassers *ab initio*.[5]

[1] (1610) 8 Co Rep 146 (*a*); (*b*) Smith's Leading Cases Vol I 134 (13th Edition).

[2] *Shorland* v *Govett* (1826) 5 B & C 485.

[3] (1610) 8 Coke 146*a*; 1 Sm L C Vol I 134.

[4] *Brojendra Kissore Ray Chaudhuri* v *Lufleman* (1908) 12 C. W. N. 982 following *Smith* v *Egginton* (1837) 7 Ad & El 167.

[5] *Canadian Pacific Wine Co* v *Tuley* [1921] A C 417; *Elias* v *Pasmore* [1934] 2 K. B 164.

Leading case—THE SIX CARPENTERS CASE OR VAUX v NEWMAN

Refusal to pay for wine in a tavern—In the leading case six carpenters entered a tavern and did there buy and drink a quart of wine and then paid for the same They then gave a further order for another quart of wine and a penny worth of bread amounting to 8*d* This order was also fulfilled but for the second supply the men refused to pay The question was whether this non payment made their original entry into the tavern unlawful The Court held that the men did not become trespassers *ab initio* because there was a mere non feasance in refusing to pay [1]

Unlawful seizure of documents—In order to effect the arrest of a person the defendants, police officers entered the plaintiffs premises While there they seized and carried away documents found on the premises. Amongst the document there were some which constituted evidence on the trial of the person arrested but there were others which did not so constitute and were subsequently returned In an action for trespass it was held that the defendants were only trespassers *ab initio* as to the documents that were seized and returned but were no liable for any damages in respect of the entry on the premises for the purpose of arrest.[2]

3 *Dispossession*

Dispossession or ouster is wrongfully taking possession of land from its rightful owner The word dispossession applies only to cases where the owner of land has by the act of some person been deprived altogether of his dominion over the land itself or the receipt of its profits [3] In order to constitute dispossession there must in every case be positive acts which can be referred only to the intention of acquiring exclusive control [4]

Where a person enters upon the land of another and holds possession for a time and then without having acquired title under the statute abandons possession the rightful owner in the abandonment is in the same position in all respects as he was before the intrusion took place.[5]

Remedy—Formerly in England the party dispossessed could bring an action of ejectment Since the Judicature Act 1873 he has to bring an action to recover the land

Possession is good against all the world except the person who can show a good title.[6] It is sufficient if the plaintiff proves a better right than the defendant s even though it is inferior to that of some third person.[7] It will thus appear that the possession of the wrong doer is not a legal possession against the person ousted and the latter on proving possession

[1] *Six Carpenters* case (1610) 1 Sm L. C. Vol. I 134

[2] *Elias* v *Pasmore* [1934] 2 K B 164

[3] *Gobind Lall* v *Debendronath* (1880) 6 Cal 311

[4] P & W 85 *Sundara Sastrial* v *Govinda Mandaroyan* (1909) 19 M L. J 309

[5] *Ganapati* v *Raghunath* (1909) 11 Bom. L. R. 1087 following *Agency Co* v *Short* (1888) 13 App Cas. 793 *Kali Mutu Asari* v *Meera Hussein* (1922) 1 Burma L J 251

[6] *Asher* v *Whitlock* (1865) L R. 1 Q B 1 5 *Perry* v *Clissold* [1907] A. C. 73 *Allen* v *Rivington* (1671) 2 Saund 111

[7] *Davison* v *Gent* (1857) 1 H & N 744

and ouster can succeed in ejectment against the wrong doer But there are authorities conflicting with this view which lay down that possession alone is not sufficient in ejectment (as it is in trespass) to maintain the action but such possession is *prima facie* evidence of title and no other interest appearing in proof evidence of seisin in fee[1] This presumption cannot be rebutted merely by showing that the plaintiff did not derive his possession from any person who had title.[2]

When possession at a certain time has been satisfactorily proved a presumption of possession at an antecedent period may in certain circum stances arise[3] Where the question of possession is doubtful a presumption will arise in favour of the party who proves title[4]

There is no uniformity of opinion on the question whether *jus tertii* is or is not a good defence to an action of ejectment but in the following cases *it cannot be set up at all*

(1) Landlord and tenant The landlord need not prove his title but only the termination of the tenancy Neither a tenant nor any one claiming under him can dispute the landlord s title[5]

(2) Licensees cannot dispute the title of the persons who licensed them There is no distinction between the case of a tenant and that of a common licensee[6]

There is a conflict of opinion[7] between the different High Courts as to whether a plaintiff in a suit for possession of immovable property other than a suit under s 9 of the Specific Relief Act[8] is entitled to succeed merely upon proof of previous possession and dispossession by the defend ant within twelve years prior to the suit or whether he is bound to prove title

A full bench of the Bombay High Court has held that possession is a good title against all persons except the rightful owner and entitles the possessor to maintain ejectment against any other person than such owner who dispossesses him[9] The view of the Bombay High Court is in accord

[1] Per Patterson J in *Doe dem Carter* v *Barnard* (1849) 13 Q B 945 953 *Vide* also *Nagle* v *Shea* (1874) 8 Ir R C L 224 (1875) 9 Ir R C L 389 *Doe dem Crisp* v *Barber* (1788) 2 T R 749 See *Bala Kushaba* v *Abai Amrita Vagmode* (1909) 11 Bom L R 1093 *Sitaram* v *Sadhu* (1913) 16 Bom L R 132

[2] *Doe dem Smith* v *Webber* (1834) 1 A & E 119 *Doe dem Hughes* v *Dyeball* (1829) Mood & Mal 316

[3] *Anangamanjari* v *Tripura Sundari* (1887) 14 Cal 740

[4] *Runjeet Ram* v *Goburdhun* (1873) 20 W R 25 *Mohima Chunder* v *Hurro Lall* (1878) 3 Cal 768 *Dharm Singh* v *Hur Pershad* (1885) 12 Cal 38

[5] *Vide* also the Indian Evidence Act s 116

[6] *Ibid*

[7] See a learned dissertation on this subject in (1901) 3 Bom L R J 110 The same subject is also discussed in (1899) 3 C W N pp cclxxiii ccxcii and (1901) 6 C W N p ix

[8] I of 1877

[9] *Pemraj* v *Narayan* (1882) 6 Bom 215 F B *Vithoba* v *Narayan* (1883) P J 262 *Sakalchand* v *Sundertal* (1889) P J 309 *Ramchandra* v *Narayan* (1886) 11 Bom 216 *Krishnacharya* v *Lingawa* (1895) 20 Bom 270 *Ambalal* v *Secretary of State* (1899) 1 Bom. L. R 45 *Basapa* v *Basapa* (1900) 2 Bom L R 410

nce with the English law The effect of the Bombay cases is that when here is a wrongful ouster of the person in possession the person who omes into Court to oust such tort feasor need not prove more than his ossession of the land in dispute and that he has been ousted by the efendant and that the plaintiff s prior possession is *prima facie* evidence f his title.[1] Possession must be of such a character as leads to a pre umption of title.[2] Although the presumption that title goes with possession may come to the assi tance of a person who has had possession but has ost it it is open to the defendant who is in possession at the date of the uit to disprove the plaintiff's title If the plaintiff s title is disproved he annot succeed on the basis of his possession only [3]

The decisions of the Bombay High Court are however not unanimous n the point [4]

The Madras [5] Allahabad [6] Patna[7] and Rangoon[8] High Courts have ecided similarly to the Bombay High Court

The Calcutta High Court is of opinion that mere previous possession ill not entitle a plaintiff to a decree for the recovery of possession except n a suit under s 9 of the Specific Relief Act [9] The plaintiff must prove itle, and mere previous possession for any period short of the statutory eriod of twelve years cannot be sufficient for the purpose [10]

Bai Fatan v *Emad* (1901) 3 Bom L R. 246 *Ali* v *Pachubibi* (1903) Bom L R. 264 *Atmaram* v *Balaji* (1923) 25 Bom L R 1032 *Krishna ai* v *Vasudev* (1884) 8 Bom 371

[1] *Hanumantrav* v *Secretary of State* (1900) 25 Bom 287 2 Bom L R. 1111 *Rajaram* v *Nanchand* (1903) 5 Bom. L R 225 227, *Bhagwansing* v *The Secretary of State* (1906) 10 Bom L R 571 *Tukaram* v *Balabai* (1925) 27 Bom L R 474 *Hanumantrai s* case is commented on in *Vasta* v *Secretary of State* (1920) 23 Bom L R 238

[2] *Suraji Fulaji* v *Secretary of State* (1936) 39 Bom L R 216 224

Govindbhai v *Dahyabhai* 38 Bom L R 175

See *Kalu* v *Barsu* (1894) 19 Bom 803 *Hari* v *Dhondi* (1905) 8 Bom. L R 96 *Sitaram* v *Sadhu* (1913) 38 Bom 240 16 Bom L R 132 *Bala* v *Abai* (1909) 11 Bom L R 1093 1099 *Bapuji* v *Bhagvant* (1918) 20 Bom L R 346

[5] *Narayana Rou* v *Dharmachar* (1902) 26 Mad. 514 *Gangayya* v *Satyanarayana* (1925) 22 L W 120 See *Krishna Aiyar* v *Secretary of State for India* (1909) 33 Mad. 173 *Ramanathan Chettiar* v *Lakshmanan Chettiar* (1930) 54 Mad 622

[6] *Wali Ahmad* v *Ajudhia Kandu* (1801) 13 All 537 F B See *Laccho* v *Har Sahai* (1887) 12 All 46 *Gobind Prasad* v *Mohun Lal* (1901) 24 All 157

[7] *Haradhan Mandal* v *Iswar Das* (1916) 2 P L. J 61 *Bodha Ganderi* v *Ashloke Singh* (1926) 5 Pat 765 *Chaturbhuj Singh* v *Sarada Charar Guha* (1932) 11 Pat 701

[8] *Ma Pwa Zon* v *Ma Pan I* (1927) 5 Ran 154

[9] *Ertaza Hoosein* v *Bany Mistry* (1882) 9 Cal 130 *Debi Churn* *Issur Chunder* (1882) 9 Cal 39 *Purmeshur* v *Brijo Lall* (1889) 17 Cal 256

[10] *Nisa Chand* v *Kanchiram* (1899) 26 Cal 579 584 *Shama Churn* v *Abdul Kabeer* (1898) 3 C. W N 158 Doubt has been expressed as to the correctness of the view taken in this case in *Shyama Charan Roy* v *Surya Kanta Acharya* (1910) 15 C. W N 163 *Manik Borai* v *Bani Charan* (1910) 13 C L. J 649 See also *Naba Kishore* v *Paro Bewa* (1922) 50 Cal. 23

The Privy Council laid down in a case in which the plaintiff was a purchaser in possession and the defendant had no title at all that lawful possession of land is sufficient evidence of right as owner as against a person who has no title whatever and who is a mere trespasser The former can obtain a declaratory decree and an injunction restraining the wrong-doer

The Privy Council has also held that the plaintiff in an action for ejectment must recover by the strength of his own title and not the weakness of his adversary's[2] Where the defendant at the date of the suit is in possession of the land from which it is sought to eject him the plaintiff must prove a title against the defendant to the possession[3]

Defences—The defences to such suits are mainly two fold —(1) that the defendant has a better title than the plaintiff and (2) prescription that is the defendant having held the immovable property or enjoyed the interest for twelve years and upwards the plaintiff s title has thereby become extinguished and the defendant has acquired a good title

Damages—The plaintiff should show the value of the mesne profits received by the adverse occupant A trespasser who enters on another person s land and cultivates thereon does not thereby become entitled to the produce[4]

4 *Injuries to reversion*

Injuries to reversionary interests are done either by strangers or by tenants Injuries of the second kind are known as waste

Whenever any wrongful act is necessarily injurious to the reversion to land or has actually been injurious to the reversionary interest the reversioner may sue the wrong doer[5] He may sue for trespass disturbance of servitudes nuisance, if the reversionary interest is affected

Obstruction of an incorporeal right as of way[6] air light[7] water[8] etc may be an injury to the reversion There must be some injury of a permanent character to the land to enable a reversioner to support an action against a third person[9] If the injury is of a temporary nature

1 *Ismail Ariff* v *Mahomed Ghouse* (1893) 20 I A 99 20 Cal 834 *Sundar* v *Parbati* (1889) 12 All 51 P C

2 *Jowla Buksh* v *Dharum Singh* (1866) 10 M I A 511 *Thakur Basant Singh* v *Mahabir Pershad* (1913) 15 Bom L. R 525 530 P C

3 *Dharni Kanta Lahiri* v *Gabar Ali Khan* (1912) 15 Bom. L. R. 445 P C *Ramchandra* v *Vinayak* (1914) 16 Bom L. R. 863 900 P C.

4 *Maung Kye* v *Maung Tha Han* (1924) 2 Ran 488

5 *Bedingfield* v *Onslow* (1797) 3 Lev 209

6 *Kidgill* v *Moor* (1850) 9 C B 364

7 *Metropolitan Association for Improving the Dwellings of the Industrious Classes* v *Petch* (1858) 27 L. J C P 330

8 *Greenslade* v *Halliday* (1830) 6 Bing 379

9 *Baxter* v *Taylor* (1832) 4 B & Ad 72 *Rust* v *Victoria Graving Dock Co* (1887) 36 Ch D 113 *Shelfer* v *City of London Electric Lighting Co* [1895] 1 Ch 287 318

the occupier of the land may bring an action e g bare trespass unaccompanied by any physical injury to the land

5 Waste

Waste is a spoil or destruction of houses gardens trees, or other corporeal hereditaments to the disherison of him who hath the remainder or reversion Whatever does a lasting damage to the freehold is waste[1] Some act or omission prejudicial to inheritance is essential upon which to ground an action for waste.

Indian law —A tenant holding under a lease of a permanent character has no power to make excavations of such a character as to cause substantial damage to the property demised[2] But a grant of a permanent tenure when the subject matter of the grant is agricultural land conveys to the grantee all the underground rights unless there be express reservation to the contrary[3] A person having a life estate is not entitled to open new mines He is entitled to remove from the land only such things as in the ordinary course of nature replace themselves such as fruits and other agricultural produce[4] The gift of a portion of the property of which the donor is a life-tenant constitutes waste unless the alienation is supported by necessity[5] A mortgagee in possession of land is not ordinarily liable for waste if he cuts down trees planted by him[6]

Action —An action for waste must generally be brought by the person next entitled in remainder and if the latter has only a life estate, he is entitled to such damages as are commensurate with the injury done to his life estate It is no answer to such an action to say that the value of property i enhanced by the changes made The lessor is entitled to have the premises kept in the state in which he demised them

In India an action for waste is generally maintained by reversioners against Hindu widows[7]

Damages and injunction.—In an action for waste the actual damage sustained may be recovered and an injunction obtained against the recurrence of the mischief To obtain an injunction the plaintiff must prove

1 Blackstone Vol II p 281 *Doe dem Grubb* v *Earl of Burlington* (1833) 5 B & A 507 517 *Jones* v *Chappell* (1875) L R 20 Eq 539 *Tucker* v *Linger* (1882) 21 Ch D 18 8 App Cas 508 *West Ham Central Charity Board* v *East London Water works Co* [1900] 1 Ch 624 *Simmons* v *Norton* (1831) 7 Bing 640 *City of London* v *Greyme* (1608) Cro Jac 181

2 *Girish Chandra Chando* v *Sirish Chandra Das* (1904) 9 C W N 255

3 *Sriram Chukrabutty* v *Kumar Hari Narain* (1905) 10 C W N 425

4 *Mahomed Buktyar Shah (Prince)* v *Rani Dhojamani* (1905) 2 C. L. J 20

5 *Ahmed* v *Bai Bibi* (1919) 22 Bom L R. 826

6 *Ramchandra* v *Shripati* (1926) 28 Bom L R 1258

7 *Budhun* v *Fu loor* (1868) 9 W R. 362 *Maharani* v *Nanda Lal* (1868) 1 Beng L. R. (A. C. J) 27 10 W R 73 *Gobindmani* v *Shamlal* (1864) Beng L R (SUP VOL.) 48 *Shama Soonduree* v *Jumoona* (1875) 24 W R 86 *Hurrydoss* v *Shreemutty* (1856) 6 M I A. 433 *Loll Soonder Doss* v *Hurry Kishen Doss* (1862) Marsh. 113 sub-nom *Hurrykishen Doss* v *Loll Soonder Doss* (1862) 1 Hay 339

that what the defendant is doing is prejudicial to the inheritance If it improves the value of the land it is not waste.[1]

6 *Wrongs to easement*

An easement is a right which the owner of one property—termed the dominant tenement—has to compel the owner of another property—termed the servient tenement—to permit something to be done or to refrain from doing something on the servient tenement for the benefit of the dominant tenement e g right to light a right of way An easement is a right not naturally belonging to land but becoming appurtenant thereto by some method of acquisition Every landowner has however certain natural rights attached to the land as rights of property not requiring any acquisition e g right of support for land right to water

Easements are distinguished from natural rights inasmuch as the former are founded upon (1) prescription or (2) a grant express or implied whereas the latter are incident to the possession of immovable property The most ordinary instances of easements are the rights of air or light of way and of artificial water courses

When easement has once been acquired it will stand upon the same footing as a natural right of property and any infringement thereof will be punished at law either by damages for the unlawful acts or an injunction to prevent their repetition

The most important natural rights and easements the invasion of which is treated as wrong are —

1 Right to support of—
   (1) Land by land
      (a) Lateral support.
      (b) Vertical support
   (2) Buildings by land
   (3) Buildings by buildings
   (4) Land and buildings by water
2 Riparian rights
   (1) Surface water
      (a) Natural streams.
      (b) Water standing on the soil or not flowing in a defined channel
      (c) Artificial watercourses.
   (2) Subterranean water
      (a) Subterranean streams the courses of which are well known and clearly defined.
      (b) Subterranean streams the courses of which are undefined
      (c) Percolating water the course of which is underground undefined and unknown
3 Right to free access of light and air

[1] *Meux v Cobley* [1892] 2 Ch. 253

4 Rights of way
  (1) Public rights of way
  (2) Rights of way belonging to a certain class of persons
  (3) Private rights of way for
    (a) General purposes
    (b) Foot passengers and
    (c) Sweepers
5 Right of privacy
6 Right of prospect

1 RIGHT TO SUPPORT

The right to support referred to in all the following instances is quite independent of any question of negligence

Support of land by land

Support of land by land may be either —

(a) The lateral support of land by adjacent land or

(b) The vertical support of the surface by the subsoil where the property in the two is distinct.

(a) Lateral support —Every proprietor of land is entitled to such an amount of lateral support from the adjoining land of his neighbour as is necessary to sustain his own land in its natural state not being weighted by walls or buildings[1] This is a natural right[2] Such a right is not an easement but a right of property[3] If the land has been weighted by superstructure the landowner who has thus weighted his land is not entitled *ex jure naturæ* to the additional support from his neighbour s soil necessary for the maintenance of the building for one landowner cannot, by altering the natural condition of his land or by erecting buildings thereon deprive his neighbour of the privilege of using his land as he might have done before.[4] But a right of support in extension of the natural right may be acquired by prescription or grant

Leading case—SMITH *v* THACKERAH

Fall of a building owing to a well sunk on adjoining land—In the leading case A dug a well near B s land which sank in consequence and a building erected on it within twenty years fell, and it was proved that if the building had not been on B s land, the land would still have sunk but the damage to B would have been inappreciable it was held that B had no right of action against A.[5]

[1] *Humphries* v *Brodgen* (1850) 12 Q B 739 744 *Hunt* v *Peake* (1860) 29 L. J Ch 785 *Backhouse* v *Bonomi* (1861) 9 H L C. 503

[2] *Roubotham* v *Wilson* (1857) 8 E & B 123

[3] *Backhouse* v *Bonomi* sup *Tamluk Trading and Manufacturing Company Limited* v *Nabadwipchandra Nandi* (1931) 59 Cal. 363

[4] *Wyatt* v *Harrison* (1832) 3 B & Ad 871 *Partridge* v *Scott* (1838) 3 M & W 220 *Bengal Provincial Railway Company Ltd* v *Rajanee Kanta De* (1935) 63 Cal 441

[5] *Smith* v *Thackerah* (1866) L. R. 1 C P 564 See *Corporation of Birmingham* v *Allen* (1877) 6 Ch D 284 *Greenwell* v *The Low Beechburn Coal Co* [1897] 2 Q B 165

Infringement —The subsidence of land attributable either to the ac or default of the defendant is itself an interference with the plaintif enjoyment of his own property and as such constitutes the cause action [1]

The Court will interfere by injunction to prevent irreparable dama to land when anything is done by the owner of the adjacent land in h own land so as to let the former land slip or go down or subside eve if no actual damage is sustained by the former land If the plainti proves that owing to the action of his neighbour there is imminent dang to his land or that the apprehended injury if it does occur will be irrepa able he is entitled to an injunction though no actual damage has occurred If damage is claimed the right of support must be shown to have bee infringed and this infringement takes place as soon as and not until damag is sustained in consequence of the withdrawal of the support.[3]

(*b*) Vertical support —There is a right of support of land by sub jacent land when the surface and subsoil are vested in different owner The owner of the surface is entitled of common law right to the suppo of the subjacent strata so that the owner of the subsoil and mineral cannot lawfully remove them without leaving support sufficient to main tain the surface in its natural state [5] If the owner of the land grants th subsoil reserving the surface to himself he impliedly grants reasonabl means of access to the subsoil and the grantee would have a right to g upon and dig through the surface, to enable him to reach the subsoil if h had no other means of access thereto But the owner of the subsoil may maintain an action against the owner of the surface, if he digs holes into the subsoil to a greater extent than is reasonably necessary for the prope and fair use cultivation and enjoyment of the surface or if he remove so much of the surface that the mines below are flooded [6]

Infringement —The owner of the surface has no right of action unti some actual damage has been sustained by him [7] Proof of pecuniary los is not necessary if actual subsidence is proved [8] Whenever a fresh sub sidence occurs although proceeding from the original act or omission, a new

[1] *Backhouse* v *Bonomi* (1861) 9 H. L C 503 *Mitchell* v *Darley Main Colliery Co* (1884) 14 Q B D 125 140, *Attorney General* v *Conduit Colliery Company* [1895] 1 Q B 301 311 In *Smith* v *Thackerah* (1866) L. R. 1 C. P 564 however it has been held that the infringement of the right of support does not give rise to a cause of action unless there is appreciable damage. See to the same effect *A Minus* v *E Davey* (1932) 11 Ran 47

[2] *Tamluk Trading and Manufacturing Company Limited* v *Nabadwipchandra Nandi* (1931) 59 Cal 363

[3] *Bindu Basini Choudhrani* v *Jahnabi Choudhrani* (1896) 24 Cal 260 *A Minus* v *E Davey* sup

[4] *Prasanna Deb Raikat* v *The Darjeeling Himalayan Railway Co Ltd* (1935) 61 C L J 503

[5] *Humphries* v *Brogden* (1850) 12 Q B 739 *Backhouse* v *Bonomi* sup. *Ambalal Khora* v *The Bihar Hosiery Mills Ltd* (1937) 16 Pat. 545

[6] *Cox* v *Glue* (1848) 5 C. B 533

[7] *Backhouse* v *Bonomi* sup Act V of 1882 s. 34

[8] *Att General* v *Conduit Colliery Co* sup

i e of action accrues in respect of the damage done thereby and the riod of limitation begins to run afresh[1]

2 *Support of buildings by land*

Support of buildings by land may be either —

(*a*) The support of buildings laterally by adjacent soil or

(*b*) The support of buildings vertically by subjacent soil

The natural right to support exists in respect of land only and not respect of buildings, but a right to support for buildings both from ljacent and subjacent land may be acquired by—

(1) Grant, which may be (*a*) express or (*b*) implied e g where man has granted part of his land for building[2]

Thus if land not granted expressly for building purposes is weighted ith buildings the owner of the surface has no right to additional support cessary for the maintenance of the buildings until he has acquired the ght so that if the owner of the subsoil in working mines leaves sufficient ipport for the surface, but the land sinks in consequence of the weight the buildings that have been placed upon it the owner of the subsoil not responsible for the damage done[3] But if the weight of the build g has in no way caused the sinking of the land and the land would ave fallen in whether building had been erected on it or not the build g on the land becomes quite immaterial and the defendant is respon ble for damages to the extent of the injury done both to building and ind[4]

(2) Prescription A building which has *de facto* enjoyed under ne circumstances and conditions required by the law of prescription (viz penly and without concealment) support for more than twenty years as the same right as an ancient house would have had[5] Though the right f support to a building is not a common law right and must be acquired et when it is acquired the right of the owner of the building to support or it is precisely the same as that of the owner of land to support for [6]

Leading case—DALTON *v* ANGUS

In the leading case two dwelling houses adjoined built independently but ach on the extremity of its owner s soil and having lateral support from the oil on which the other rested This having continued for more than twenty ears one of the houses (plaintiffs) was converted into a coach factory the nternal walls being removed and girders inserted into a stack of brickwork in uch a way as to throw more lateral pressure than before upon the soil under the djoining house The conversion was made openly and without deception or

[1] *The Darley Main Colliery Co* v *Mitchell* (1886) 11 App Cas 127 *Rigby* v *Bennett* (1882) 21 Ch D 559

[3] *Backhouse* v *Bonomi* (1861) 9 H L C 503

[4] *Brown* v *Robins* (1859) 4 H & N 186

[5] *Dalton* v *Angus* (1881) 6 App Cas 740

[6] *Backhouse* v *Bonomi* sup

concealment. More than twenty years after the conversion the owners of the adjoining house employed a contractor to pull down their house and excavate, the contractor being bound to shore up adjoining buildings and make good all damage The house was pulled down and the soil under it excavated to a depth of several feet and the plaintiff s stack being deprived of the lateral support of the adjacent soil sank and fell bringing down with it most of the factory It was held that the plaintiffs had acquired a right of support for their factory by the twenty years enjoyment and could sue the owners of the adjoining house and the contractor for the injury [1]

3 *Support of buildings by buildings*

The right to support for one building from an adjoining building is not a natural right It may however arise in different ways [2] e g grant [3] prescription or both houses having been built by the same owner [4]

The mere fact of contiguity of buildings imposes an obligation on the owners to use due care and skill in removing one building so as not to damage the other even though no right to support has been acquired [5]

If one man builds two or more houses each needing the support of the other and then if he sells one it is presumed that he reserves for himself and grants to the buyer the right of mutual support and so if he sells several such houses to several persons at different times each has the same right of support with regard to the priority of titles [6]

Three contiguous houses in a street visibly leaned out of the perpendicular for upwards of thirty years A s house leaning on B s On the expiration of a lease to a tenant, B took down his house the effect of which by removing the support was to cause C s house to fall down and C s house falling A s house fell It was held that the fall of A s house did not give him a right of action against B for A had not either a natural or an acquired right to have his house supported by B s through the intermediate house [7]

Infringement—Damage is necessary to give a right of action [8] The

[1] *Dalton* v *Angus* (1881) 6 App Cas 740 S owned a house which had stood for sixteen years only on a piece of land adjoining M s land M for the purpose of building a house on his said land laid the foundations S s land then gave way thereby causing injury to his house For this injury he sued M for damages alleging negligence on the part of M in sinking the foundations of his house On the evidence the Court found that the ultimate cause of the collapse of the ground under S s house was one which was beyond the reach of M It was held that at the highest S had against M a natural right of support to his land but no right whatever in respect of the buildings imposed on it unless and until they had been there for twenty years, and that the only damages which S could claim would be in respect of the infringement of the right to support of his land *S D Shaik Yacoob* v *Moung Ohn Ghine* (1901) 8 Burma L. R. 1

[2] *Solomon* v *Vintners Co* (1859) 4 H & N 585 598.

[3] *Partridge* v *Scott* (1838) 3 M & W 220

[4] *Peyton* v *The Mayor etc of London* (1829) 9 B & C 725 736

[5] *Dodd* v *Holme* (1834) 1 A & E 493

[6] *Richards* v *Rose* (1853) 9 Ex. 218 *Howarth* v *Armstrong* (1897) 77 L T 62

[7] *Solomon* v *Vintners Co* (1859) 4 H & N 585

[8] *Backhouse* v *Bonomi* (1861) 9 H L C 503 See Act V of 1882 s 34 See *Corporation of Birmingham* v

right established in *Dalton* v *Angus* to a right of support for an ancient building by the adjacent land equally applies to support enjoyed from an adjacent building even though both the buildings were erected by different owners.[1]

4 *Support of land and buildings by water*

An owner of land has no right at common law to the support of subterranean water The right of vertical support does not extend to have the support of underground water which may be in the soil so as to prevent the adjoining owner from draining his soil if for any reason it becomes necessary or convenient for him to do so the presence of the water in the soil being an accidental circumstance the continuance of which the landowner has no right to count upon[2]

Support by water—Some cottages were built on land of a wet and spongy character the land not having been properly drained the adjoining land was sold fo the purpose of erecting a church and on excavation for the foundations the water was drawn from the spongy land the surface subsided and the cottages were cracked and injured It was held that there was nothing at common law to prevent the owner of land from draining his soil if it was necessary or convenient for him to do so though he might, by grant express or implied, oblige himself to suffer the underground water to remain[3]

Support by running silt—Where the plaintiff s land was supported not by a stratum of water but by a bed of wet sand or running silt and the defendants caused the subsidence of the plaintiff s land by withdrawing this support it was held that they were liable.[4] The decision in the former case was held not applicable as it dealt only with support by water

2 RIPARIAN RIGHTS

Riparian rights are those rights which reside in a riparian proprietor or are incident and inseparably annexed to his ownership of riparian land abutting on a natural stream whether permanent or intermittent as distinguished from easements or acquired rights (derived by grant covenant prescription or statute) which a riparian proprietor may have in a stream either natural or artificial Riparian owners have the same natural riparian rights in public navigable and tidal rivers as in private streams[5] The right of a riparian owner on the banks of a tidal navigable river exists *jure naturae* but it is essential to its existence that his land should be in contact with the flow of the stream at least at the times of ordinary high tides[6]

Allen (1877) 6 Ch D 284 *N Ram Krishna Iyer* v *Seetharama Iyer* [1912] M W N 1117

1 *Lemaitre* v *Davis* (1881) 19 Ch D 281

Elliot v *N E Ry* (1863) 10 H L C 333 *Popplewell* v *Hodkinson* (1869) L R. 4 Ex 248

3 *Popplewell* v *Hodkinson* ibid

4 *Jordeson* v *Sutton & Co* [1899] 2 Ch 217 See *Trinidad Asphalt Co* v *Ambard* [1899] A C. 594

5 *Lyon* v *The Fishmongers Co* (1876) 1 App Cas. 662

6 *Dawood Hashim Esoof* v *C Tuck Sein* (1931) 9 Ran 122 33 Bom L. R. 897 P C

The law as to riparian owners is the same in India as in England and is stated in illustration (*h*) of s 7 of the Indian Easements Act [1]

(1) *Surface water*

The chief characteristic of surface water is its inability to maintain its identity and existence as a water body [2]

Natural watercourses or streams — A natural stream is a stream arising at its source from natural causes and flowing in a natural channel [3] Every landowner has a natural right to the uninterrupted flow without diminution deterioration in quality or alteration of the water of natural surface streams which pass to his lands in defined channels and to transmit the water to the land of other persons in its accustomed course.[4] This right belongs to the proprietor of the adjoining lands as a natural incident to the right to the soil itself Riparian owners are entitled to use and consume the water of the stream for drinking and household purposes for watering their cattle for irrigating their land and for purposes of manufacture subject to the conditions that—

(1) the use is reasonable
(2) it is required for their purposes as owners of the land and
(3) it does not destroy or render useless or materially diminish or affect the application of the water by riparian owners below the stream in the exercise either of natural right or their right of easement if any [5]

Each proprietor has a right to a reasonable use of the water as it passes his land but in the absence of some special custom he has no right to dam it back or exhaust it so as to deprive other riparian owners of the like use [6] A riparian owner may make defences against floods on

[1] Act V of 1882 *Narayan* v *Keshav* (1898) 23 Bom 506

Adinarayana v *Ramudu* (1912) 37 Mad. 304

[3] *M'Nab* v *Robertson*, [1897] A C 129 See *Gopala Krishna Yachendrudu Baru* v *Secretary of State* (1914) 16 M L T 597 Water course also denotes the stream itself as it flows in a channel *Collins* v *Ten Broeke* (1896) P R No 71 of 1896

[4] *Mason* v *Hill* (1833) 5 B & Ad 1 *John Young & Co* v *Bankier D Co* [1893] A C 691 *Debi Pershad Singh* v *Joynath Singh* (1897) 24 Cal 865 P C *Maung Bya* v *Maung Kyi Nyo* (1925) 52 I A 385 27 Bom L R 1427 *Khushalbhai* v *Secretary of State* (1925) 28 Bom L R 251

[5] *Perumal* v *Ramasami* (1887) 11 Mad 16 *Sheikh Monoour* v *Kaniya* (1865) 3 W R 218 *Athur Ali* v *Sekundar* (1865) 4 W R 28 *Sardotran* v *Hurbans* (1869) 11 W R 251 *Waman Bapuji* v *Changu Has Patil* (1904) 8 Bom L R 87 See Easements Act V of 1882 s. 7 ill (*j*) *Dinkar* v *Narayan* (1905) 7 Bom L R 265 29 Bom 357 *Maung Hmat Gyang* v *Maung Shwe Min* (1883) S J L B 233 *Tha E* v *Lon Ma Gale* (1904) 3 L B R 23 *Baldeo Singh* v *Jugal Kishore* (1911) 33 All 619 *Waceera* v *Sipadar Khan* (1867) P R No 33 of 1867 *Murli* v *Hanuman Prasad* (1936) 58 All 981

[6] *Narayan* v *Keshav* sup *Chumroo Singh* v *Mullick Khyrul* (1872) 18 W R 525 *Heeranund* v *Khubeeroonissa* (1870) 15 W R 516 *Mahadu Rama* v *Narayan Yesh Shet* (1901) 6 Bom. L R 291 *Belbhadar Pershad* v *Sheikh Barkat Ali* (1906) 11 C W N 85 4 C L J 370 *Krishna Dayal (Mahantha)* v *Bhawani Koer* (1917) 3 P L W 5 *Jagannadharazu* v *Rajah of Vizianagaram* [1937] Mad 510 F B.

his own land provided he does not interfere with a recognised flood channel but if flood water comes on to his own land he cannot take active steps to turn it to his neighbour's property [1]

Infringement —If the rights of a riparian proprietor are interfered with he may maintain an action against the wrong doer even though he may not be able to prove that he has suffered any actual loss

Action —As between riparian owners the law established in England is that diversion of water for riparian purposes is not actionable without proof of injury but diversion for non riparian purposes is actionable without proof of such injury In Madras it is held that the Government by virtue of the paramount power vested in it as aforesaid will not be liable in either case without proof of damage This paramount right of Government is recognized by the Legislature in s 7 (2) (*a*) of the Indian Easements Act It is independent of the ownership of the bed of the stream and exists alike whether the interest affected is that of ryotwari tenants or of the holders of proprietary estates [3]

A dam had been in existence across a river for upwards of two hundred and eighty years and during all that time the villages of D and P had received an equal supply of water from separate sluices in the dam The Government authorities being of opinion that D required less water than P reduced the size of the D sluice and consequently the amount of water flowing to the D village The inhabitants of D appealed against the action of the Government It was held that the Government had no such right of interference.[4]

(*b*) Artificial watercourses —An artificial stream is one arising by human agency or flowing in an artificial channel The right to artificial watercourses as against the party creating them depends upon the character of the watercourse whether it be of a permanent or temporary nature and upon the circumstances under which it is created [5] If it is permanent

1 *M & S M Ry Co Ltd* v *Maharaja of Pithapuram* [1937] Mad 919 *Lankapara Tea Company Limited* v *Gopalpur Tea Company Limited* (1936) 63 Cal. 1008

Wood v *Waud* (1849) 3 Ex 748 *Shunkur* v *Gurbhoo* (1871) 15 W R 216 *Kau La* v *Maung Ke* (1916) 8 L B R 556

3 *Fischer* v *The Secretary of State for India* (1908) 32 Mad. 141 See *Kandukuri Balasurya* v *The Secretary of State for India* (1917) 19 Bom L R 751 757 P C See Madras Act III of 1905

4 *Collector of Nasik* v *Shamji Dasrath* (1878) 7 Bom 209 See *Debi Pershad Singh* v *Joynath Singh* (1897) 24 Cal 865 P C See *Venkatachalam Chettiar* v *Zamindar of Sivaganga* (1901) 27 Mad 409

5 *Wood* v *Waud* (1849) 3 Ex 748 776-77 *Whitmores Ltd* v *Stanford* [1909] 1 Ch 427 *Greatrex* v *Hayward* (1853) 8 Ex 291 *Yesu Sakharam* v *Ladu Nana* (1926) 51 Bom 243 29 Bom. L R. 291 *Raman Nair* v *Parameswaran Nambudri* (1934) 40 L W 629 [1935] M W N 990

Indian cases —Water falling on A land was collected in a reservoir there and used to flow on B's land It was held that B had no right to the use of the water and that A was entitled to erect on his own land a *bund* to prevent the water flowing on to B's land *Bunsee Sahoo* v *Kalee Pershad* (1870) 13 W R 414 *Rameshur Pershad Narain Sing* v *Koonj Behary Pattuk* (1878) 4 Cal 633 P C. An interference by the defendants with the plaintiff's right a ryotwari landholder to the supply of water from a Government channel for the irrigation of his land

in its character a right to the uninterrupted flow of the water may be acquired by prescription or grant against both the originator of the stream and also against any person over whose land the water flows[1] If it is of temporary character no right could be acquired by prescription because the temporary nature of the stream precludes a presumption of a grant of a permanent right[2]

There is no right to tap an artificial watercourse unless by grant or prescription[3] But a right of easement may be acquired in the surplus water of a tank flowing through a defined channel whether natural or artificial[4]

(c) Surface water not flowing in any defined channel—Every landowner has a natural right to collect and retain upon his own land the surface water not flowing in a defined channel and put it to such use as he may desire He may also allow it to flow away in the usual course of nature upon the lower lands of his neighbour and cannot be bound to prevent it from so doing[5] The owner of the lower land may acquire by prescription as an easement restricting this natural right the right to prevent the natural flow of water from the higher land on to his own[6] The owner of the upper land is however not entitled to do anything that will throw on the lower land water which would not have naturally gon there[7] An owner of land on a lower level to which surface water from adjacent land on a higher level naturally flows is not entitled to deal with his lands so as to obstruct the flow of water from the higher land This principle applies to all lands whether situate in the country or in towns[8]

gives rise to a cause of action against the defendants *Rama Odayan* v *Subramanya Aiyar* (1908) 31 Mad 171

1 *Sutcliffe* v *Booth* (1863) 32 L J Q B 136 *Holker* v *Porritt* (1875) L R 10 Ex 59 *Baily* v *Clark* [1902] 1 Ch 649 See *Bhoop Narain Singh* v *Ka ee Syud Keramut Ali* (1866) 6 W R 99 See *Ram Kirpal* v *Hanuman* (1920) 6 P L J 6 which deals with rights where a natural stream flowed in an artificial channel The widening a little and deepening a little and trimming a little of an existing ancient fresh water natural watercourse does not convert it into a canal *Maung Bya* v *Maung Kyi Nyo* (1925) 52 I A 385 27 Bom L R 1427

2 *Arkwright* v *Gell* (1839) 5 M & W 203 *Burrows* v *Lang* [1901] 2 Ch 502

3 *Run Bahadur* v *Poodhee* (1864) W R (Gap No) 319 *Buddun Thakoor* v *Mohunt Shunker Doss* (1861) W R (Gap No) 106 *Bipin Behari Ghatak* v *Ramnath Ghatak* (1928) 56 Cal 161

4 *Ravappan* v *Virbhadra* (1884) 7 Mad 530

5 *Mussammat Sarban* v *Phudo Sahu* (1922) 2 Pat 110 *Robinson & Maniyam* v *Ayya* (1872) 7 M H C 37 *Perumal* v *Ramasami* (1887) 11 Mad 16 *Adinarayana* v *Ramudu* (1912) 37 Mad 304 *Nagarethna Mudaliar* v *Sami Pillai* (1935) 59 Mad 979

6 *U Po Thet* v *A L S P P L Chettyar Firm* (1936) 14 Ran 544

7 *Sankarappa Naicker* v *Rari Nachiar* (1913) 25 M L J 276 *Gopala Krishna Yachendrula Varu* v *Secretary of State* (1914) 16 M L T 597 *Bhagirathi* v *Suraj Mal* (1914) 12 A L J 684 *Moksadali* v *Ma Hli* (1923) 1 Ran 427 *Ma Hla* v *Moksadali* (1924) 2 Ran 450

8 *Sheik Hussain Sahib* v *Subbayya* (1925) 49 Mad 441 F B following *Gibbons* v *Lenfestey* (1915) 113 L T N S 55

The fact that the water discharged from the dominant tenement flows over the surface of the servient tenement without a definite channel for its carriage cannot prevent the acquisition of an easement [1]

2 *Subterranean water*

In this class come—

(a) Subterranean streams the courses of which are known and clearly defined

(*b*) Subterranean streams the courses of which are undefined

(*c*) Percolating water the course of which is underground undefined and unknown

(*a*) The right to an underground stream flowing in a known and definite channel is a right *ex natura* and an incident to the land itself as a beneficial adjunct to it [2]

If the course of a subterranean stream were well known as is the case with many which sink underground pursue for a short space a subterraneous course, and then emerge again the owner of the soil under which the stream flowed could maintain an action for the diversion of it if it took place under such circumstances as would have enabled him to recover had the stream been wholly above ground [3] If the underground water flows in a defined channel into a well supplying a stream above ground but the existence and course of that channel are not known and cannot be ascertained except by excavation the lower riparian proprietors on the banks of the stream have no right of action for the abstraction of the underground water [4]

(*b*) and (*c*) The principles which apply to flowing water in streams are wholly inapplicable to water percolating through underground strata which has no certain course no defined limits but which oozes through the soil in every direction in which the rain penetrates There is no natural right to the uninterrupted flow of such streams [5] Such a right cannot also be acquired by prescription A landowner has therefore the right to appropriate water percolating in no defined channel through the strata beneath his land and no action will lie against him for so doing, even if he thereby intercepts abstracts or diverts water which would otherwise pass to or remain under the land of another [6] But he is not entitled to pollute water flowing beneath another s land [7] He can also be restrained

[1] *Munshi Misser v Bhimraj Ram* (1913) 40 Cal 458 F B

[2] *Wood v Waud* (1849) 3 Ex 748

[3] *Dickinson v Grand Junction Canal Co* (1852) 7 Ex 282 300 301 *Dudden v Guardians of Clutton Union* (1857) 1 H & N 627 See *Babaji Ramling v Appa Vithalja* (1923) 25 Bom L R 789

[4] *Bradford Corporation v Ferrand* [1902] 2 Ch 655

[5] *Acton v Blundell* (1843) 12 M & W 324

[6] *Chasemore v Richards* (1859) 7 H L C 349 *Mayor etc of Bradford v Pickles* [1895] A C 587 *M Nab v Robertson* [1897] A C 129

[7] *Ballard v Tomlinson* (1885) 29 Ch D 115

from drawing off the subterranean water on the adjoining land if in so doing he draws off water which has once flowed in a defined surface channel[1]

Leading case—CHASEMORE v RICHARDS

Drying up of a stream owing to a new well on adjoining property—In the leading case a landowner and a millowner who had had for above sixty years enjoyed the use of a stream which was chiefly supplied by percolating underground water lost the use of the stream after an adjoining owner had dug on his own ground an extensive well for the purpose of supplying water to the inhabitants of the district many of whom had no title as landowners to the use of the water In an action brought by the landowner it was held that the principles which regulate the rights of owners of land in respect to water flowing in known and defined channels whether upon or below the surface of the ground do not apply to underground water which merely percolates through the strata in no known channels and the plaintiff had no right of action[2]

Polluting neighbour s well by turning sewage into one s own—A and B two neighbours each possessed a deep well on his own land A turned sewage into his well in consequence whereof the well of B being at a lower level became polluted by underground percolation it was held that an action lay by B against A There is a considerable difference between intercepting water in which no property exists and sending a new foreign and deleterious substance on to another s property The immediate *damnum* namely the pollution of the water might be possibly no legal *damnum* but allowing sewage to escape into another s property is of itself an *injuria* which needs no *damnum*[3]

3 RIGHT TO FREE ACCESS OF AIR AND LIGHT

Air

An owner or occupier of land or buildings has no natural right to free passage of air over open adjoining land Such a right cannot be acquired as an easement by prescription or by a lost grant Thus no action will lie for the obstruction of the passage of wind to an ancient mill[4] or chimney[5] A right to have air come over a neighbour's land in a particular channel to a particular place may be established by immemorial user but in the absence of actual contract no one can claim a right to have the general current of air over his neighbour s property kept uninterrupted[6]

1 *The Grand Junction Canal Co* v *Shugar* (1871) L R 6 Ch App 488

2 *Chasemore* v *Richards* (1859) 7 H L C 349

3 *Ballard* v *Tomlinson* (1885) 29 Ch D 115

4 *Webb* v *Bird* (1863) 13 C B N S 841

5 *Bryant* v *Lefever* (1879) 4 C P D 172

6 *Chastey* v *Ackland* [1895] 2 Ch 389 The reasoning and the decision of the Court of Appeal in this case are doubted by the House of Lords, see [1897] A C 155 Right to passage of air through a defined channel or aperture can be acquired by uninterrupted user for twenty years *Bass* v *Gregory* (1890) 25 Q B D 481 In *Hall* v *Lichfield Brewery Co* (1880) 49 L J Ch 655 the Court decreed a claim to the access of air to a slaughter house through two apertures made in the adjoining wall belonging to the neighbouring owner

Indian law.—Access and use of air to and for any building may be acquired under the Indian Easements Act[1] if it has been peaceably enjoyed therewith without interruption for twenty years. The right to air is co-extensive with the right to light. The owner of a house cannot by prescription claim to be entitled to the free and uninterrupted passage of a current of wind. He can claim no more air than what is sufficient for sanitary purposes.[3] There is no right as a right to the uninterrupted flow of south breeze as such.[4] There is no easement for free access of wind.[5] In this country a man who has enjoyed a right to air more or less pure and free will be reasonably protected against any interference.[6] The conditions here are different from those existing in England so far as air is concerned. In England more light is needed than here, whereas more air is needed here than in England.[7]

Infringement.—The right to the purity of air is not violated unless the annoyance is such as materially to interfere with the ordinary comfort of human existence.[8] It is only in rare and special cases involving danger to health, or at the least something very nearly approaching it, that the Court would be justified in interfering on the ground of diminution of air.[9]

Indian law.—Where the easement disturbed is a right to the free passage of air to the opening in a house, damage is substantial if it interferes materially with the physical comfort of the plaintiff, though it is not injurious to his health.[10]

The Indian Easements Act is not extended to the Bengal Presidency and the principles laid down in the Indian Limitation Act generally govern cases of interference with the access of air to dwelling houses. The Calcutta High Court has held that obstruction in such cases must be such as to cause what is technically called a nuisance to the house, in other word, to render the house unfit for the ordinary purpose of habitation or business.[11]

1 Act V of 1882, s. 15.
2 *Delhi and London Bank* v. *Hem Lall Dutt* (1887) 14 Cal. 839; *Pranjivandas* v. *Mayaram* (1862) 1 B. H. C. 148. Easement of light and air through window opened in a joint wall cannot be acquired by prescription: *Rajubhai* v. *Lalbhai* (1925) 28 Bom. L. R. 1000.
3 *Barrow* v. *Archer* (1864) 2 Hyde 125.
4 *Delhi and London Bank* v. *Hem Lall Dutt*, sup.
5 *Sarojini Devi* v. *Krishna Lal* (1922) 36 C. L. J. 406.
6 *Framji Shapurji* v. *Framji Edulji* (1905) 7 Bom. L. R. 73, 825.
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8 Per Lord Romilly, M. R., in *Crump* v. *Lambert* (1867) L. R. 3 Eq. 409, 413.
9 Per Lord Selbourne in *City of London Brewery Co.* v. *Tennant* (1873) L. R. 9 Ch. 212, 221; *Dent* v. *Auction Mart Co.* (1866) L. R. 2 Eq. 238.
10 Expl. III to s. 33 of the Indian Easements Act V of 1882.
11 *Delhi and London Bank* v. *Hem Lall Dutt*, sup.

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4 *Delhi and London Bank* v. *Hem Lall Dutt*, sup.
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7 *Framji Shapurji* v. *Framji Edulji* (1905) 7 Bom L R 352. English decisions are not of much avail as the conditions in the two countries differ. *ibid*.
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9 Per Lord Selbourne in *City of London Brewery Co* v. *Tennant* (1873) L. R. 9 Ch. 212, 221; *Dent* v. *Auction Mart Co* (1866) L R 2 Eq 238.
10 Expl III to s. 33 of the Indian Easements Act V of 1882.
11 *Delhi and London Bank* v. *Hem Lall Dutt*, sup.

Light

An owner of ancient lights is entitled to sufficient light according to the ordinary notions of mankind for the comfortable use and enjoyment of his house as a dwelling house, if it is a dwelling house or for the beneficial use and occupation of the house if it is a warehouse a shop or other place of business[1]

The right to light is nothing more or less than the right to prevent the owner or occupier of an adjoining tenement from building or placing on his own land anything which has the effect of illegally obstructing or obscuring the light of the dominant tenement[2] It is in truth no more than a right to be protected against a particular form of nuisance and an action for the obstruction of light which has in fact been used and enjoyed for twenty years without interruption or written consent cannot be sustained unless the obstruction amounts to an actionable nuisance[3]

The right to light is a negative easement and may be acquired—

(1) By grant or covenant express or implied[4]

(2) By prescription under the Prescription Act[5] in England and the Indian Easements Act[6] in India These Acts necessitate an enjoyment without interruption for a full period of twenty years to confer the right But the dominant owner does not by his easement obtain a right to all the light he has enjoyed He obtains a right to so much of it as will suffice for the ordinary purposes of inhabitancy or business according to the ordinary notions of mankind having regard to the locality and surroundings[7] A right of light by prescription to a room in a residential house is not to be measured by the use to which the room has been put in the past.[8]

(3) By reservation on the sale of the servient tenement If a vendor of land desires to reserve any right in the nature of an easement for the benefit of his adjacent land which he is not parting with he must do it by express words in the deed of conveyance, except in the case of easement of necessity[9]

Under the English law the rights to light and air are acquired differently The right to light is acquired under the Prescription Act Whereas the right to air is acquired at common law The Indian Easements Act

[1] *Colls* v *Home and Colonial Stores* [1904] A. C 179 208

[2] *Ibid* p 186

[3] Per Lord Lindley in *ibid* p 212 See *Paul* v *Robson* (1914) 41 I A 180 16 Bom. L R. 803 followed in *Balthazar* v *Patail* (1918) 11 B L T 109

[4] *Corbett* v *Jonas* [1892] 3 Ch 137

[5] St. 2 & 3 Will IV c. 71 s. 3 The English statute is only concerned with the mode of proof *Colls* v *Home & Col Stores* [1901] A C 179 186

[6] Act V of 1882 s 15

[7] Per Lord Loreburn in *Jolly* v *Kine* [1907] A C 1 2 See *Higgins* v *Betts* [1905] 2 Ch 210 *Vir Bhan* v *Ramjidas* (1909) P L. R. No 33 of 1909 *Bhimji* v *Yeshwant* (1929) 31 Bom L R 771

[8] *Price* v *Hilditch* [1930] 1 Ch 500

[9] *Ray* v *Hazeldine* [1904] 2 Ch 17 *Wheeldon* v *Burrows* (1879) 12 Ch D 31

places light and air on the same footing[1]

No alteration in the dominant tenement will destroy the right to light so long as the owner of the tenement can show that he is using through the new apertures in the wall of the new building the same or a substantial part of the same light which passed through the old apertures into the old building The real test is identity of light and not identity of aperture or entrance for the light It makes no difference that the new window or aperture is at a much higher level than the old window[3]

Light for special purpose —The right to a special amount of light necessary for a particular business cannot be acquired by twenty years enjoyment to the knowledge of the owner of the servient tenement[4] In measuring the quantum of light to which the owner of the dominant tenement is entitled the purpose for which he desires to use or uses the light should be disregarded and does not either enlarge or diminish the easement which he has acquired[5]

Infringement —There must be a substantial privation of light enough to render the occupation of the house uncomfortable according to the ordinary notions of mankind and in the case of business premises to prevent the plaintiff from carrying on his business as beneficially as before[6] To

[1] *Delhi and London Bank* v *Hem Lall Dutt* (1887) 14 Cal 839 *Elliott* v *Bhoobun Mohun* (1873) 12 Beng L R 406 *Sarubai* v *Bapu* (1878) 2 Bom. 660

No action lies for restraining the defendant from erecting a building so that its shadow may not fall on plaintiff s blind wall *Hakim Maltani Mal* v *Mrs V E Earle* (1931) 12 Lah. 736

[2] *Scott* v *Pape* (1886) 31 Ch. D 554 *Pendarves* v *Monro* [1892] 1 Ch 611 See *Bai Hariganga* v *Tvikamlal Kedareshwar* (1902) 4 Bom L R 34 26 Bom 374 *Framji Shapurji* v *Framji Edulji* (1905) 7 Bom. L R 73

[3] *Andrews* v *Waite* [1907] 2 Ch 500 No alteration of a building which would not involve the loss of a right to light when indefeasibly acquired will if made during the currency of the statutory period prevent the acquisition of the right *ibid*

[4] *Ambler* v *Gordon* [1905] 1 K. B 417

[5] Per Bray J in *ibid* p 424 see also the judgments of Lord Halsbury and Lord Davey in *Colls* v *Home and Colonial Stores* [1904] A C 179 203 The case of *Lanfranchi* v *Mackenzie* (1887) L. R. 4 Eq 421—which was overruled in *Warren* v *Brown infra* which in its turn is overruled in *Colls* case—is referred to in the judgment of Bray J but not that of *Lazarus* v *Artistic Photo Co* [1897] 2 Ch 214 The former laid down that to establish the right to the access of an extraordinary amount of light necessary for a particular purpose or business to ancient window open uninterrupted and known enjoyment of such light in the manner in which it is at present enjoyed and claimed must be shown for a period of twenty years The latter ruled that a person who is in the present enjoyment of an access of light to his premises for a special or extraordinary purpose such as photography may obtain an injunction against interference with it though he may not have been in the enjoyment of it for that special or extraordinary purpose for the full statutory period of twenty years.

[6] *Colls* v *Home and Colonial Stores Ltd* sup overruling *Warren* v *Brown* [1902] 1 K. B 15 followed in *Framji Shapurji* v *Framji Edulji* (1904) 7 Bom. L. R. 73 *Chhotalal Mohanlal* v *Lallubhai Surchand* (1904) 6 Bom. L. R 633 29 Bom 157 *Vir Bhan* v *Ramjidas* (1909) P R. No 8 of 1909 *Rattan Chand* v *Lal Chand* (1933) 15 [?] 320 *Bahri Rahla Ram* v *Shit*

determine whether a nuisance has been proved the existing state of things must be considered but subject to the qualification that light and air coming from other sources to which a right has not been acquired by grant or prescription, ought not to be taken into account [1] Where a room in a building receives light through windows on different sides which are ancient lights the owner of land on either side as a general rule can build only to such a height as if a building of like height were erected on the other side would not deprive the room of so much light as to cause a nuisance [2]

Indian law—No damage is substantial unless it materially diminishes the value of the dominant heritage or interferes materially with physical comfort of the plaintiff or prevents him from carrying on his accustomed business in the dominant heritage as beneficially as he had done previous to instituting the suit [3] In considering the sufficiency of the light the light coming from other quarters should be considered [4] The extent of a prescriptive right to the passage of light and air to a certain window is provided for by s 28 (*c*) of the Indian Easements Act An easement of light to a window only gives a right to have buildings that obstruct it removed so as to allow the access of sufficient light to the window [5]

As the Indian Easements Act is not extended to the Bengal Presidency the principle laid down in *Bagram s* case will apply there, viz The only amount of light for a dwelling house which can be claimed by prescription or by length of enjoyment without an actual grant is such an amount as is reasonably necessary for the convenient and comfortable habitation of the house [6] It is not enough that the light is less than before but the test is whether the obstruction complained of is a nuisance [7]

The 45 degrees rule—It was supposed for some years that a building did not constitute a material obstruction in the eye of the law or at the least it was so presumed if its elevation subtended an angle not exceeding

(1934) 37 P L R 34 *Wali Mohammad* v *Batuk* [1936] A L J R 712

[1] *Colls* v *Home and Colonial Stores* [1904] A C 179 201 *Jolly* v *Kine* [1907] A. C 1 7 *Kine* v *Jolly* [1905] 1 Ch 480 497

[2] *Sheffield Masonic Hall Co* v *Sheffield Corporation* [1932] 2 Ch 17

[3] Explanations I and II to s. 33 of the Indian Easements Act V of 1882 See *Kadarbhai* v *Rahimbhai* (1889) 13 Bom 674 *Dhunjibhoy* v *Lisboa* (1888) 13 Bom 252 *Ghanasham* v *Moroba* (1894) 18 Bom 474 *Sultan Nawaz Jung* v *Rustomji* (1896) 20 Bom 704 (1900) 2 Bom L R 518 24 Bom 156 P C *Chhotalal Mohanlal* v *Lallubhai Surchand* (1904) 29 Bom. 157 6 Bom. L R 633 *Framji Shapurji* v *Framji Edulji* (1905) 7 Bom L R 73 352 825 30 Bom 319 followed in *Bapuji A Kothare* v *Parmanandas* (1907) 9 Bom. L R. J 335

[4] *Mohammad Zaman Khan* v *Umar Hayat Khan* (1936) 38 P L R 1003

[5] *Bala* v *Maharu* (1895) 20 Bom 788 See *Ratanji* v *Edalji* (1871) 8 B H C (O C J) 181

[6] *John George Bagram* v *Khettranath* (1869) 3 Beng L R (O C J) 18 *Modhoosoodun* v *Bissonauth* (1865) 15 Beng L R. 361 *Delhi and London Bank* v *Hem Lall Dutt* (1887) 14 Cal 839

[7] *John Alexander Anderson* v *Hardut Roy* (1905) 9 C. W N 543 See *Paul* v *Robson* (1914) 41 I A 180 16 Bom L. R 803

45 degrees at the base of the light alleged to be obstructed or as it was sometimes put left 45 degrees of light to the plaintiff (that is in other words, when opposite to ancient lights a wall is built not higher than the distance between that wall and the ancient lights)

The House of Lords has observed that this rule is not a rule of law and is not applicable to every case but that it may properly be used as *prima facie* evidence[1] It is generally speaking a fair working rule to consider that no substantial injury is done to a person where an angle of 45 degrees is left to him, especially if there is good light from other directions as well[2] Light from other quarters cannot be disregarded[3]

Indian law—The 45 degrees rule is not a positive rule of law but is a circumstance which the Court may take into consideration and is especially valuable when the proof of the obscuration is not definite or satisfactory[4]

Leading case—COLLS v HOME AND COLONIAL STORES LTD

In the leading case the respondents were the lessees of a building in a street in which they carried on their business Colls (appellant) proposed to build on land on the opposite side of the street a building forty two feet high which the respondents believed would obstruct their light and they brought an action against Colls for an injunction It was found that the proposed building would not materially interfere with the access of light to any windows of the respondents except two windows on the ground floor These windows were two out of five windows facing the street in a room used by the respondents as an office for clerks and the respondents premises would still be sufficiently lighted for all ordinary purposes of occupancy as a place of business. It was held that no action lay as the buildings of the appellant had not so materially interfered with the light previously enjoyed by the plaintiffs as to amount to a nuisance.[5]

Opening new windows—Where a person who has a right to light from a certain window opens a new window or enlarges the old one the owner of an adjoining house has a right to obstruct the new or enlarged opening if he can do so without obstructing the old but if he cannot obstruct the new without obstructing the old he must submit to the burden.[6]

Remedy—In cases of infringement of light an injunction may be granted to prevent the obstruction Injunction will be granted if for instance the injury cannot fairly be compensated by money if the defendant

[1] Per Lord Davey in *Colls v Home and Colonial Stores Ltd* [1904] A. C 179 204

[2] Per Lord Lindley in *ibid* p 210 Cotton L J in *Ecclesiastical Commissioners v Kino* (1880) 14 Ch D 213 228 *Parker v First Avenue Hotel* (1883) 24 Ch. D 282

[3] *Colls v Home & Col Stores Ltd* sup p 211 James V C in *Dyers Co v King* (1870) L R. 9 Eq 438

[4] *Delhi and London Bank v Hem Lall Dutt* (1887) 14 Cal 839 *Dhunjibhoy v Lisboa* (1888) 13 Bom. 252 *Bala v Maharu* (1895) 20 Bom. 788 *Framji Shapurji v Framji Edulji* (1904) 7 Bom. L R. 73 *Chhotalal Mohanlal v Lallubhai Surchand* (1904) 29 Bom. 187 6 Bom. L. R. 633

[5] *Colls v Home and Colonial Stores Ltd* sup

[6] *Prioabutty Dabee v Mohendro Lall Bose* (1881) 7 Cal 453 *Lalu v Padamsi* (1889) P J 310

has acted in a high handed manner if he has endeavoured to steal a march upon the plaintiff or to evade jurisdiction of the Court But if there is really a question as to whether the obstruction is legal or not and if the defendant has acted fairly and not in an unneighbourly spirit the Court ought to incline to damages rather than to an injunction [1]

Indian law—In cases of light Courts ought not to interfere by way of injunction when obstruction of light is very slight and where the injury sustained is trifling except in rare and exceptional cases Where the defendant is doing an act which will render the plaintiff s property absolutely useless to him unless it is stopped in such a case inasmuch as the only compensation which could be given to the plaintiff would be to compel the defendant to purchase his property out and out the Court will not in the exercise of its discretion compel the plaintiff to sell his property to the defendant by refusing to grant him an injunction and awarding him damages on that basis Between these two extremes where the injury to the plaintiff would be less serious where the Court considers the property may still remain with the plaintiff and be substantially useful to him as it was before and where the injury is one of a nature that can be compensated by money the Courts are vested with a discretion to withhold or grant an injunction having regard to all the circumstances of the particular case before them [2] In India the Court has a discretion it *may* not *shall* issue an injunction where the injury is such that pecuniary compensation would not afford adequate relief [3]

In some cases a mandatory injunction will also be granted Courts will grant such injunction where a man who has a right to light and air which is obstructed by his neighbour s building brings his suit and applies for an injunction as soon as he can after the commencement of the building or after it has become apparent that the intended building will interfere with his light and air [4] But the Court should be satisfied that a sub-

1 Per Lord Macnaghten in *Colls* v *Home and Colonial Stores Ltd* [1904] A C 179 193 As to measure of damages, see *Griffith* v *Richards Clay & Sons Ltd* [1912] 2 Ch 291 See *Ankerson* v *Connelly* [1907] 1 Ch 678 *Litchfield Speer* v *Queen Anne s Gate Syndicate (No 2) Ltd* [1919] 1 Ch 407

2 Per Farran J in *Ghanasham* v *Moroba* (1894) 18 Bom 474 at pp 488 489 Injunction will be granted where the light required is for a special purpose *Yaro* v *Sanaullah* (1897) 19 All 259

3 *Mahomed Auzam Ismail* v *Jaganath Jamnadas* (1925) 3 Ran 230 *Poozundaung Bazaar Co Ltd* v *Ellerman s Arracan Rice and Trading Co Ltd* (1934) 12 Ran 200

4 *Dent* v *Auction Mart Co* (1866) L R 2 Eq 238 *Aynsley* v *Glover* (1874) L R 18 Eq 544 *Smith* v *Smith* (1875) L R 20 Eq 500 *Krehl* v *Burrell* (1877) 7 Ch D 551 *Greenwood* v *Hornsey* (1886) 33 Ch D 471 *Syud Mahomed* v *Syud Jafur* (1865) 4 W R 23 *Jamnadas* v *Atmaram* (1877) 2 Bom 133 *Nandkishor* v *Bhagubhai* (1883) 8 Bom 95 *Kadarbhai* v *Rahimbhai* (1889) 13 Bom 674 *Bala* v *Maharu* (1895) 20 Bom 788 *Chhotalal Mohanlal* v *Lallubhai Surchand* (1904) 29 Bom. 157 160 6 Bom L R 633 *Kirpa Ram* v *Gurbaksh* (1892) P R No 2 of 1893 *Thakar Das* v *Abdul Hamid* (1920) 2 L L J 701

stantial loss of comfort has been caused and not a mere fanciful or vision ary loss.[1]

If a plaintiff has not brought his suit or applied for an injunction at the earliest opportunity and has waited till the building has been finished and then asks the Court to have it removed a mandatory injunction will not generally be granted[2]

4 RIGHT OF WAY

Rights of way do not fall under the denomination of natural right Rights of way are never given by law to owners of land (a special char acteristic of a natural right) but they are discontinuous easements, and may be acquired in the same way as the other easements are acquired. As to the precise nature of a right of way there is no difference in prin ciple between a public right of way and a private right of way as it is in either case the mere right of passing over the soil of another person uninterruptedly though in the one case the right is for every individual to pass while in the other it is for a particular person only A right of way is ordinarily a right of passing and not a general right to pass from one point to another point,[3] or to halt every few yards for several minutes at a time and block up the thoroughfare.[4]

The right of way may be created by express grant, or by immemo rial custom or necessity[5] or by prescription[6] If the grantor has reserved expressly for the benefit of his other land a right of way for a limited

1 *Dhannu Mal* v *Bhaguan Das* (1902) P L R. No 138 of 1902 *Abdulla* v *Beg Mahomed* (1903) 5 Bom. L R 446 *Muthu Krishna Ayyar* v *Somalinga* (1911) 36 Mad 11

2 *Isenberg* v *The East I H E Co* (1863) 3 De G J & S 263 *Curriers Co* v *Corbett* (1865) 2 Dr & Sm 355 *Durell* v *Pritchard* (1865) L R. 1 Ch 244 *City of London Brewery Co* v *Tennant* (1873) L R. 9 Ch. 212 *Stanley of Alderley (Lady)* v *Shrewsbury (Earl of)* (1875) L R. 19 Eq 616 *Benode Coomaree* v *Soudaminey* (1889) 16 Cal 252 *Beharee* v *Mt Ajnas* (1866) 6 W R 86 *Dhunjibhoy* v *Lisboa* (1888) 13 Bom 252 *Gharc sham* v *Moroba* (1894) 18 Bom 474 *Sultan Nana* v *Rustomji* (1896) 20 Bom 704 on appeal (1899) 2 Bom. L. R 518 24 Bom. 156 P C. *Bhimaji* v *Yeshwant* (1929) 31 Bom L. R. 771

3 *Goluck Chunder* v *Tarinee Churn* (1865) 4 W R 49

4 *Muhammad Zaman* v *Manzur Hasan* (1921) 43 All 692

5 *Imambundee* v *Sheo Dyal* (1870) 14 W R. 199 *Bhugwan* v *Khosal* (1867) 7 W R. 271 *Nubeen* v *Bhoobun* (1871) 15 W R. 526 *Oomur Shah* v *Rumzan* (1868) 10 W R. 363 *Municipality of Poona* v *Vaman* (1894) 19 Bom 797 *Charu Surnokar* v *Dokouri* (1882) 8 Cal. 956 *Hari* v *Ramchandra* (1903) 5 Bom L R. 650 See *Vibudapriya T ur thaswamy* v *Esoof Sahib* (1910) 35 Mad. 28 as to dedication of way as a highway See *Muhammad Rustom* v *The Municipal Committee of Karnal City* (1919) 22 Bom L R. 563 P C

6 *Ram Gunga* v *Gobind* (1871) 16 W R. 284 *Savalgiapa* v *Basvanapa* (1873) 10 B H C. 399 *Joy Doorga* v *Juggernath* (1871) 15 W R 295 *Heera Lall* v *Purmessur* (1871) 15 W R. 401 *Mohim Chunder* v *Chun dee* (1868) 10 W R 452 *Gopee* v *Bhoobun* (1875) 23 W R. 401 *Sham Bhagee* v *Fukeer* (1866) 6 W R. 222 Whether non user amounts to abandon ment see *S A Christopher* v *J A Cohen* (1924) 2 Ran. 534

purpose then the way cannot be used for all purposes[1]

As to the nature of rights of way they may be general in their character or in other words usable for all purposes and at all times or the right to use them may be limited to particular purposes e.g for sweepers[3] or to certain times[4] Thus a right of way may be limited to agricultural purposes only—and the existence of such a right is not itself sufficient evidence of general right for all purposes—as to carry lime or stone from a newly opened quarry[5] or it may be limited to the purpose of driving cattle[6] or carriages[7] or of the passage of boats[8] or it may be a horse-way or merely a way for foot passengers[9] or the right of user may be limited to such times as a gate is open[10] or to certain hours of the day or when the crops are off the land

There are three distinct classes of rights of way—

(1) There are private rights in the strict sense of the term vested in particular individuals or the owners of particular tenements and such rights commonly have their origin in grant or prescription.

(2) There are rights belonging to certain classes of persons, certain portions of the public such as the freemen of a city the tenants of a manor or the inhabitants of a parish or village Such rights commonly have their origin in custom.

(3) There are public rights in the full sense of the term which exist for the benefit of all the King's subjects and the source of these is ordinarily dedication

These three classes of rights exist in England as well as in India[11]

1 *Liddiard* v *Waldron* [1933] 1 K B 435

2 *Raj Manick* v *Ruttun* (1870) 15 W R. 46 *Lokenath* v *Monmohun* (1873) 20 W R. 293 General right of way includes way for sweepers *Maneklal* v *Maneklal* (1932) 34 Bom. L. R. 1150

3 *Jadulal* v *Gopal Chandra* (1886) 13 Cal 136 *Esubai* v *Damodar* (1891) 16 Bom. 552 *Soloji* v *Pandoji* (1875) P J 172 *Ramchandra* v *Anant* (1925) 28 Bom L R. 601

4 *Ramsoonder* v *Woomakant* (1864) 1 W R. 217 *Oomur Shah* v *Rumzan Ali* (1868) 10 W R 363

5 *Jackson* v *Stacey* (1816) Holt N P 455 A right of way acquired by prescription for agricultural purposes can be used for other purposes provided that the burden on the servient tenement is not increased by such user *Manchersha* v *Virjivalavdas* (1926) 28 Bom. L. R. 1158

6 *Joy Doorga* v *Juggernath* (1871) 15 W R. 295 *Mahomed* v *Sefatoollah* (1874) 22 W R. 340

7 *Ranchordass* v *Maneklal* (1890) 17 Bom. 648

8 *Koylash Chunder* v *Sonatun* (1881) 7 Cal 132 *Doorga Churn* v *Kally Coomar* (1881) 7 Cal 145

9 *Ballard* v *Dyson* (1808) 1 Taunt 279 *Goluck Chunder* v *Tarinee Churn* (1865) 4 W R. 49 *Hamid Hossein* v *Gerrain* (1871) 15 W R. 496 *Tarneechurn* v *Tarneechurn* (1866) 1 Ind Jur N S 6 *Ranchordass* v *Maneklal* sup *Wutzler* v *Sharpe* (1893) 15 All. 270 *Municipality of the City of Poona* v *Vaman* (1894) 19 Bom. 797 *Naran* v *Lallubhai* (1900) 2 Bom L. R. 116.

10 *Raghupati* v *Bapuji* (1874) P J 3

11 *Chuni Lall* v *Ram Kishen* (1888) 15 Cal 460 F B *Maung Tha Zan* v *U San Win* (1903) 2 L. B R. 134 See *Kali Charan Naskar* v *Ram Kumar* (1912) 17 C W N 73 *Prannath Kundu* v *Emperor* (1929) 57 Cal 526 *Bissessar Pathak* v *Harbans Lal* (1936) 17 P L T 842

Public right of way—Such a right of way exists over highways or navigable rivers A highway is a road over which the public at large possesses a right of way A public highway must lead from one public place to another[1] The public have the right to the free use of any portion of the highway[2]

According to common law the ownership of a highway is in the owners of the land adjoining the highway on either side. By statute the owner ship is vested in municipal bodies Every person who occupies land adjoin ing a highway has a private right of access to the highway from his land and *vice versa*[3] The right of access to a highway by the occupier of land abutting upon it is different from the right of passage over it The former is a private right[4] the latter a public right

The rights over a public highway cannot be limited to any class or section of the public An attempt to dedicate a highway to a limited por tion of the public is no dedication at all[5]

The right to use a thoroughfare should be exercised in a reasonable manner without any wanton disregard of the legal rights of others or a riotous demonstration to provoke animosities[6]

Infringement—A person commits a wrong who disturbs the enjoy ment of a right of way by blocking it up permanently or temporarily or by otherwise preventing the free use of it

Action—With regard to the first and second classes of rights of way they do not require a permanent obstruction to give rise to a right of action Thus the padlocking of a gate is sufficient[7] Permitting carts or wagons to remain stationary in a passage in the course of loading and unloading so as to obstruct the person who has a right of way will give rise to an action[8]

In the case of an obstruction to a private right of way proof of special

[1] *Attorney General* v *Antrobus* [1905] 2 Ch 188 *Turner* v *Spooner* (1861) 30 L J Ch. 801 803, *Jatindranath Barat* v *Corporation of Calcutta* (1930) 58 Cal 12 1125 A *cul de sac* may be a public highway but its dedication will not be presumed from *mere public user without evidence of* expenditure for repairs, lighting and other matters by the public authority *ibid* See also *Samrendra Nath Saha Roy* v *Harendra Kumar Saha* (1934) 39 C W N 303

[2] *Harvey* v *Truro Rural Council* [1903] 2 Ch 638 *Emperor* v *Vadilal Devchand* (1931) 33 Bom L R 663

[3] *Rose* v *Groves* (1843) 5 M & G 613 *Metropolitan Board of Works* v *McCarthy* (1874) L. R. 7 H L 243 *Fritz* v *Hobson* (1880) 14 Ch D 542 Trees spontaneously growing on a pub lic highway belong to the owner of the soil that is proprietors of adjacent land and not to the local authority *Maharajah of Pittapuram* v *Chairman Municipal Council Coconada* [1936] M W N 959

[4] *Lyon* v *Wardens of Fishmongers Co* (1876) 46 L. J Ch 69 *Hanuman Prasad* v *Raghunath Prasad* (1924) 46 All 573

[5] *Subbaya Nadan* v *Arsavoo Reddi* [1917] M W N 70

[6] *Muhammad Jalil Khan* v *Ram Nath Katna* (1930) 53 All 484

[7] *Kidgell* v *Moor* (1850) 9 C. B 364

[8] *Thorpe* v *Brumfit* (1873) L. R. 8 Ch. 650

damage is not material[1] In the case of a village pathway no question of special damage arises[2]

As regards the third class that is public ways it may be noted that no action by a private individual will lie for obstruction to a public way without proving that he has sustained particular and substantial and direct damage beyond the general inconvenience and injury to the public[3] e.g obstruction rendering necessary for a person to go by a longer route.[4] Such special damage must differ not merely in degree but in kind from that sustained by the rest of the public Special damage means damage of a special character that is damage affecting the plaintiff individually or damage peculiar to himself his trade or calling[5] Where a structure containing a platform and a privy is erected in a narrow public way a person living on its opposite side may be deemed to have suffered loss without proof of such loss[6]

1 *Baiji Nath* v *Tetai Choudhry* (1901) 6 C W N 197

Harish v *Pran Nath* (1923) 39 C L J 347 See *Ramghulam Khatik* v *Ramkhelawan Ram* (1936) 16 Pat 190 which holds that a resident of a village can sue for removal of an obstruction to a village path or to a well without alleging any special damage

3 *Vanderpant* v *Mayfair Hotel Co* [1930] 1 Ch 138 *Winterbottom* v *Lord Derby* (1867) L R 2 Ex. 316 The Indian cases are to the same effect.

See *Baroda Prasad* v *Gora Chand* (1869) 3 Beng L R (A C J) 295 12 W R 160 *Raj Luckhee* v *Chunder Kant* (1870) 14 W R 173 *Bhageeruth* v *Gokool* (1872) 18 W R 58 *Bhugeeruth* v *Chundee Churn* (1874) 22 W R 462 *Parbati Charan* v *Kali Nath* (1870) 6 Beng L R (App) 73 *Ramtarak* v *Dinanath* (1871) 7 Beng L R 184 24 W R 414*n* *Raj Koomar* v *Sahebzada* (1877) 3 Cal 20 F B *Abzul Miah* v *Nasir* (1895) 22 Cal. 551 *Mohamed Abdul Hafiz* v *Latif Hosein* (1897) 24 Cal 524 *Raj Narain* v *Ekadasi Bag* (1899) 27 Cal. 793 *Mahomed* v *Dilbar* (1900) 5 C W N 285

Adamson v *Arumugam* (1886) 9 Mad 463 *Siddeswara* v *Krishna* (1890) 14 Mad. 177 *Khaji Sayyad Hussain Sahib* v *Edige Narasimhappa* (1912) 23 M L J 539 *Ganapathy* v *Subba Nayakkan* [1918] M W N 547

Karim v *Budha* (1876) 1 All 249 *Fazal Haq* v *Maha Chand* (1878) 1 All 557 *Nathu* v *Jagram* (1881) 1 A W N 3 *Kandhi* v *Kamta* (1881) 1 A W N 98 *Tafazzul Husain* v *Fazal* (1881) 1 A W N 103 *Ram phal Rai* v *Raghunandan* (1888) 8 A W N 205 *Tota* v *Sardul Singh* (1888) 8 A W N 213

Nur Ali v *Ram Gopal* (1878) P R No 10 of 1878 *Maluk Singh* v *Bela Singh* (1882) P R No 134 of 1882 *Beli Ram* v *Kaku* (1888) P R No 39 of 1888 *Chajju Mal* v *Ganda Mal* (1895) P R No 4 of 1895 *Jouand Singh* v *Sirdar Indar Singh* (1901) P R No 64 of 1901

Muhammad Din Mian v *Musammat Atirajo Kuer* (1931) 10 Pat 568. This case follows *Satku* v *Ibrahim* (1877) 2 Bom 457 which is overruled by the Privy Council in *Man ur Hasan* v *Muhammad Zaman* (1924) 47 All. 151 27 Bom L R 170 P C

The principle laid down in the above cases has no application when the plaintiff sues in respect of an interference with his private rights of property *Sheonarayan* v *Dindayal* (1930) 27 N L R 213

4 *Harihar Das* v *Chandra Kumar* (1918) 23 C W N 91 *Ram Chandra* v *Joti Prasad* (1910) 33 All 287

5 *Batiram Kolita* v *Sibram Das* (1920) 25 C W N 95 See the judgment of Mallik J in *Mandakinee Debee* v *Basanta Kumaree Debee* (1933) 60 Cal 1003 1007

6 *Pahlad Maharaj* v *Gauri Dutt Marwari* (1937) 18 P L T 737

Recently the Calcutta[1] and the Lahore[2] High Courts have held following the Privy Council ruling in *Manzur Hasan's* case,[3] that any individual member of the public has the right to maintain a suit for removal of obstruction of a public highway if his right of passage through it is obstructed without proving special damage. The Madras[4] and the Patna[5] High Courts have dissented from this view holding that obstruction to a public highway whereby members of the public are prevented from free passage is a nuisance, and special damage must therefore be proved where a suit is brought by a private individual. They further say that the Privy Council case was limited to the question of conducting religious processions through streets and public highways.

The Madras High Court has in a full bench case laid down that a person or body of persons who claim a right to go in procession along a public way can bring a suit to establish that right against a person who threatens to obstruct it without allegation or proof of special damage. An order of a Magistrate forbidding a person or body of persons from using a highway for the purpose of processions invests the person or persons interdicted with a cause of action if they alleged it to be an infringement of their legal rights and no special damage be alleged or proved.[6] This view has been upheld by the Privy Council. Members of a religious body possess the right to conduct a religious procession along a public highway and a suit lies against a person preventing the regular conduct or progress of such procession.[7]

The general public cannot acquire by user a right to visit a public monument or other object of interest upon private property.

Right of way reserved for a specific purpose only.—The common owner of two adjoining houses A and B at the back of which ran a paved path sold A without reserving any right to use the path except for one specific purpose and afterwards sold B. It was held that in the absence of any evidence of a claim of user as of right admitted or acquiesced in the purchaser of B was not entitled to use the path at the back of A for all purposes but was limited to the use which was specifically reserved.[8]

[1] *Mandakinee Debee v. Basanta Kumaree Debee* (1933) 60 Cal 1003. Mallik J however says that the plaintiff's inability to carry large articles into his house owing to the obstruction was special damage.

[2] *Municipal Committee Delhi v. Mohammad Ibrahim* (1934) 16 Lah 517.

[3] (1924) 52 I A 61, 47 All 151, 27 Bom. L R 170.

[4] *Murahari Reddi v. Gopal Reddi* [1936] M W N 372.

[5] *Ramghulam Khalik v. Ram Khelawan Ram* (1936) 16 Pat 190.

[6] *Velan Pakkiri v. Subbayyan Samban* (1918) 42 Mad 271 F B.

[7] *Manzur Hasan v. Muhammad Zaman* (1924) 51 I A. 61, 47 All 151, 27 Bom L R 170 overruling *Satku v. Ibrahim* (1877) 2 Bom. 457, *Kazi Sujaudin v. Madhavdas* (1893) 18 Bom 693, *Virupaxappa v. Sherif Sab Mulla* (1909) 11 Bom. L. R 372. See *Baslingappa v. Dharmappa* (1910) 34 Bom 571, 12 Bom. L R 586, *Muhammad Jalil Khan v. Ram Nath Katna* (1930) 53 All 484, *Jaffar Husain Khan Sahib v. Krishnan Servai* (1929) 58 M L J 703, 31 L W 845, *Janki Prasad v. Karamat Husain* [1931] A L J R. 624.

[8] *Liddiard v. Waldron* [1933] 1 K. B 435.

Obstruction on public way—Where the access to the plaintiffs premise was obstructed by reason of the assembling of a crowd at the defendants theatre and the formation of a queue in front of his premises [1] and where horses and wagons were kept standing for an unreasonable time in the highway opposite a man s house so that the access of customers was obstructed the house was darkened and the people in it were annoyed by bad smells,[2] it was held that an action lay as particular direct and substantial damage was caused to plaintiff

5 RIGHT OF PRIVACY

A right to undisturbed privacy is not recognized by the English law [3] It is quite true that the opening of a new window looking into the grounds of another may not only annoy that neighbour but may often affect the value of the property But the law of England considers that no injury

Indian law—In India a right to privacy may be acquired in virtue of a local custom or grant or special permission [4] The right of privacy does not arise from prescription but is a creation of custom It is limited to particular apartments secluded from general observation [5] Such an easement founded as it is on the oriental custom of secluding females is of much importance in India It is recognized generally by the countries whose system is founded on the civil law and the Law Commissioners who framed the Indian Easements Act have also recognized it

The Bombay High Court has held that in accordance with the usage of Gujarat an invasion of privacy is an actionable wrong and that a man may not open new doors or windows in his house or make any new apertures or enlarge old ones in a way which will enable him to overlook those portions of his neighbour's premises which are ordinarily secluded from observation and so intrude upon his privacy [6] This right of action is not altered by the fact that a public road runs between the dominant and the servient tenements [7] But where a window opened by the

[1] *Lyons & Co v Gulliver* [1914] 1 Ch 631

[2] *Benjamin v Storr* (1874) L R 9 C P 400 The diversion of traffic or custom from a man s door by an obstruction of a highway whereby his business is interrupted and his profits diminished seems to be too remote a damage to give him a right of private action *Ricket v Metropolitan Ry* (1867) L R. 2 H L 175 unless indeed the obstruction is such as materially to impede the immediate access to the plaintiff s place of business more than any other man s and amounts to something like blocking up his doorway *Fritz v Hobson* (1880) 14 Ch. D 542 *Wilkes v Hungerford Market Co* (1835) 2 Bing N C 281

[3] Per Blackburn J in *Jones v Tapling* (1862) 12 C. B N S 826 842

[4] The Indian Easements Act s. 18 ill (b) *Kesho Sahu v Musammat Mukta Kuman* (1930) 10 Pat. 280

[5] *Nathubhai v Chhaganlal* (1900) 2 Bom L R 454

[6] *Manishankar v Trikam* (1867) 5 B H C (A C J) 42 This decision i doubted in *Mulia Bhana v Sundar Dana* (1913) 15 Bom. L R 876 but is followed in *Maneklal v Mohanlal* (1919) 44 Bom. 496 22 Bom L. R. 226

[7] *Kuverji v Bai Javer* (1869) 6 B H C (A. C. J) 143 *Jamil ud din v Abdul Majeed* (1915) 13 A L J R. 361 *Fa al Haq v Fa al Haq* (1927) 26 A L J 49 *Cheddi Ram v Gokal Chand* (1928) 50 All 706 *Sardar Husain v Ahmad Husain* (1928) 5 O W N 538

defendant commanded a view not of the plaintiff's private apartments but of an open court yard outside his house, it was held that there had been no invasion of the plaintiff's privacy which would entitle him to have the window closed[1] And in a case from Dharwar the High Court decided that to establish such an exceptional privilege as was customary in the towns of Gujarat evidence of the most satisfactory character was necessary[2]

In Bengal this right has been recognised[3] It is supposed to have been based upon prescription or grant or express local usage[4] Privacy is not an inherent right of property like a right to ancient lights and air[5]

The Patna High Court has also held that the right to privacy is not an inherent right of a party and can arise only by express usage by grant or by special permission[6]

The Madras High Court is of opinion that the invasion of privacy by opening windows is not treated by the law as a wrong for which any remedy is given.[7] The person whose privacy is so invaded has it in his power to build on his own ground so as to shut out the view from the offending window[8]

The Allahabad High Court is not unanimous on the point that a customary right of privacy exists everywhere in the United Provinces or that every individual is entitled to rely on such a custom. A substantial interference with such a right where it exists affords such owner a good cause of action[9] But the custom of privacy should not be carried to an oppressive length[10] The right of privacy is a right which attaches to property and is not dependent on the religion of the owner thereof[11]

The former Chief Court of the Punjab was of opinion that a right of privacy existed in the Punjab and if opening of new windows invaded such a right an action might be brought[12] The fact that the occupant

1 *Keshav v Ganpat* (1871) 8 B H C (A C J) 87

Shrinivas v Reid (1872) 9 B H C 266

3 *Prasanna Kumar Datta v Secretary of State for India in Council* (1933) 61 Cal 245 251

4 *Sreenath Dutt v Nand Kishore Bose* (1866) 5 W R 208 *Ramlal v Mahes Baboo* (1868) 5 B L R 677n *Mahomed v Birju* (1870) 5 Beng L.R. 676 *Kalee Pershad v Ram Pershad* (1872) 18 W R. 14 *Sri Narain Choudhry v Jodoo Nath Choudhry* (1900) 5 C W N 147 *Sarojini Debi v Krishna Lal* (1922) 36 C L J 406

5 *Sheikh Golam v Kazi Mahomed* (1870) 6 Beng L R (App) 76

6 *Kesho Sahu v Musammat Muktakiman* (1930) 10 Pat. 280

Komathi v Gurunada (1866) 3 M H C 141 *Sayyad Azuf v Ameerubibi* (1894) 18 Mad. 163

8 *Sayyad Azuf v Ameerubibi* ibid

9 *Gokal Prasad v Radho* (1888) 10 All 358 387 *Lachman Prasad v Jamna Prasad* (1887) 10 All 162 *Abdul Rahman v Bhaguan Das* (1907) 29 All 582 *Gokal Prasad v Radho* is doubted in *Bhaguan Das v Zamurrad Husain* (1929) 51 All 986 *Subhaga v Janki* (1926) 29 O C. 136

10 *Bhaguan Das v Zamurrad Husain* sup

11 *Abdul Rahman v D Emile* (1893) 16 All 69

12 *Nanuck Chund v Lalla* (1869) P R No 21 of 1869 *Gohree v Jamtee* (1869) P R. No 91 of 1869 *Shibdayal v Golab* (1876) P R No 96 of 1876 *Yasin v Gokal Chand* (1882) P R. No 19 of 1882

of a house can from its roof look into his neighbour's house or yard does not empower him to open such window as he pleases[1]

The Chief Court of Oudh has adopted the view of the Allahabad High Court[2]

Action—For an infringement of this right a suit can be instituted by the owner of the building[3] or even by a lessee.[4]

6 RIGHT OF PROSPECT

The law does not recognize a view or prospect from a house as a right in the nature of an easement which can belong to anybody as of right and no period of enjoyment will give a person a right of action against another who on his land erects a structure or plants trees which obstruct the view or prospect[5]

Damages for injuries to easements—In actions for injuries to easements such as rights of way watercourses light and so forth no rule can be laid down as to the measure of damages They will vary in each case according to the species of easement and the amount of injury caused

Profits a prendre

A profit *a prendre* may be defined as a right for any man, in respect of his tenement to take some profit out of the tenement of another man[6] The right of depasturing cattle on another's land the right to cut there from and carry away turf or wood for burning within one's dwelling house the right to dig for and carry away stone slate, coal and minerals the right to shoot and sport over another's land and carry away and consume the game killed or the right to fish in the water of an estate or of a manor and carry away and consume the fish taken are all denominated as profits *a prendre* in English law but they fall into the category of easements according to Indian law[7] A profit *a prendre* on another's soil cannot be claimed by custom however ancient, uniform and clear the exercise of that custom may have been and an unlimited profit *a prendre* on another's soil cannot be claimed by prescription[8] The usually accepted

1 *Nihal Chand* v *Maulu* (1903) P L R. No 108 of 1903

2 *Sangam Madho* v *Ram Narain* (1929) 5 Luck 372

3 *Gokal Prasad* v *Radho* (1888) 10 All 358 387 As to the form of decree in such suits, see *Sheonath Rai* v *Ali Hussain* (1904) 1 A. L J R 118

4 *Kundan* v *Bidhi Chand* (1906) 29 All 64

5 *Campbell* v *Paddington Corporation* [1911] 1 K. B 869 875 *Att Gen* v *Doughty* (1752) 2 Ves. Sen 453 The plaintiffs certain worshippers of St Jacob's Church brought a suit for removing certain obstructions made by defendants on a part of the public road in front of their church on the ground of obstruction of the plaintiff's view of a curusady It was held that the suit was not maintainable *Kurusu Koshta* v *Thommai Savarimuthu* (1910) 20 M L J 307 See to the same effect, *Sarojini Debi* v *Krishna Lal* (1922) 36 C L J 406

6 Williams

7 *Sundrabai* v *Jayawant* (1898) 23 Bom. 397

8 *Vasudev* v *Collector of Thana* (1879) P J 274 *Raman* v *Collector of Thana* (1869) 6 B H C (A C.

classes of profits *a prendre* are—

1 Rights of Common
2 Rights of Ferry
3 Rights of Market

1 RIGHTS OF COMMON

Right of common is a right which one person who is not the owner has of taking some part of the natural produce of land belonging to another

Right of pasture is recognized in England as well as in India This right, in its widest sense comprises all vegetable products that may be eaten, such as grass, nuts leaves etc.[1]

Right of fishery which a person might possess in any piece of water is not a right to the fish living in such water at any time—for fish like other *feræ naturæ* cannot except in certain instances be in the possession or dominion of any man until it is actually captured—but it is simply a right to catch them This right may exist either in connection with or independently of the ownership of the soil over which water stands or flows.

A person commits a wrong when he fishes in another's fishery whether he takes fish or not or when he disturbs or drives away[2] or destroys, the fish in a fishery or diverts the water to an unreasonable extent or pollutes a several fishery and damages the fish[3]

Indian law—Right of fishery is considered as profits *a prendre* in the English law but is regarded as easement under the Indian Easements Act Private rights of fishery in public waters may be acquired either by a grant from the Crown or by prescription from which a grant may be presumed[4] The right of the public to fish in the sea is common and is not the subject of property Members of the public exercising the common right to fish in the sea should exercise that right in a fair and reasonable manner and not so as to impede others from doing the same[5] The Bom

J) 191 *Lloyd* v *Jones* (1848) 17 L J C P 206 *Bailey* v *Stevens* (1862) 31 L J C P 226

[1] *Commissioners of Sewers* v *Glasse* (1874) L R 19 Eq 134 See *Bhola Nath Nundi* v *Midnapore Zemindary Co* (1904) 31 I A 75 31 Cal 503 *Gorijala Pitchi Naidu* v *Vallur Veeriah* (1910) 34 Mad. 58

[2] *Fitzgerald* v *Firbank* [1897] 2 Ch 96

[3] *Nichols* v *Ely Beet Sugar Factory* [1931] 2 Ch 84 The defendant cannot set up a *jus tertii* in such action *ibid*

[4] *Hori Das* v *Mahamed Jaki* (1885) 11 Cal 434 F.B. *Satcowri Ghosh Mondal* v *Secretary of State* (1894) 22 Cal 252 *Arjun Kaibarta* v *Manoranjan De Bhoumik* (1933) 61 Cal 45 *Viresa* v *Tatayya* (1885) 8 Mad 467 *Lakshman* v *Ramji* (1920) 23 Bom L R. 939 See *Maung Yan Gin* v *Maung Hmon* (1898) P J L B 471 Whether exclusive right of fishery in a tidal navigable river can be acquired under s. 26 of the Indian Limitation Act there is a difference of opinion See *Viresa* v *Tatayya sup* and *Abhoy Charan Jalia* v *Dwarka Nath* (1911) 39 Cal 53 Such a right can be acquired by prescription *Chandranath Das* v *Pushkarchandra Das* (1935) 52 Cal 800

[5] *Raoji* v *Tukaram* (1928) 31 Bom L. R 329

bay High Court has ruled that a summary action under s 9 of the Specific Relief Act[1] for restitution of possession of an exclusive fishery whether such fishery be territorial or a right in *alieno solo* may also be entertained provided the conditions specified in that section be satisfied[2] But the Calcutta High Court has held that this form of action does not apply to rights of fishery of the latter kind[3] This diversity is due to the difference of opinion between the two High Courts as to the denotation of the term immovable property used in that section which makes this form of action applicable to such property alone The Patna High Court has held that an exclusive right of fishery is an interest in immovable property and may be acquired by twelve years adverse possession involving an ouster of the rightful owner But a mere right to fish not excluding the rightful owner is a profit *a prendre* and falls within the definition of easement given in s 2 (5) of the Indian Limitation Act and may be acquired by twenty years uninterrupted enjoyment[4]

2 RIGHTS OF FERRY

A ferry is the exclusive right to carry passengers across a river or arm of the sea from one vill to another or to connect a continuous line of road leading from one township or vill to another[5] A ferry is a highway common to all the King s subjects paying the toll[6] usually across a large and deep river

The right is an incorporeal right[7] It arises by royal grant or by prescription The owner of a ferry has not a grant of an exclusive right of carrying passengers and goods across the stream by any means whatever but only a grant of an exclusive right to carry them across by means of a ferry[8] If a bridge is constructed near a ferry connecting the same highways as the ferry the owner of the ferry has no remedy for divergence of the traffic[9]

In India the right of ferry or an interest therein is immovable property within the meaning of the Specific Relief Act s 9[10] The right of establishing a private ferry and levying tolls is recognized here. Twenty years is the shortest period within which such a right of ferry can be

[1] Act 1 of 1877

[2] *Bhundal Panda* v *Pandol Pos* (1887) 12 Bom 221

[3] *Natabar* v *Hubir* (1890) 18 Cal 80 *Fadu* v *Gour Mohun* (1892) 19 Cal. 544 F B *Sitaram* v *Petia* (1916) 14 N L R 35

[4] *Hill & Co* v *Sheraj Rai* (1922) 1 Pat. 674 *Secretary of State for India* v *The District Board of Tanjore* (1929) 31 L W 508

[5] *Newton* v *Cubitt* (1862) 12 C B N S 32 *Kirtyanand Singh Bahadur* v *Deonandan Prasad* (1933) 14 P L T 761

[6] *North and South Sheilds Ferry Co* v *Barker* (1848) 2 Ex 136

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[8] Per Mellish L J in *Hopkins* v *G N Ry* (1877) 2 Q B D 224 followed in *Dibden* v *Skirrow* [1907] 1 Ch 437 which does not approve of *Reg* v *Cambrian Ry* (1871) L R 6 Q B 422 432 and which is confirmed on appeal [1907] W N 225

[9] *Hopkins* v *G N Ry* sup

[10] *Krishna* v *Akilanda* (1889) 13 Mad 54

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Infringement —To create a disturbance of the rights of a ferry owner there must be a carrying of passengers and merchandise from point to point in the line of the ferry [4] Disturbance of the ferry must be proved [5] If the traffic conveyed by the defendant is different from that dealt with by the plaintiff there is no disturbance of the plaintiff s ferry [6]

The plea that the legal ferry is not sufficient for the public convenience does not avail [7]

3 RIGHTS OF MARKET

Originally it was considered a great benefit to towns to give them a fair or market and this was thought so beneficial that it was thought right not only to give the fair or market but also to grant a charter so as to prevent persons from disturbing the market The right to prevent persons from selling marketable goods on market days in their private houses (though within the town or manor where the market may be held) may be acquired by immemorial enjoyment or prescription.[8]

The Calcutta High Court has held that in Bengal there is no such thing as a market franchise or a right to hold a market conferred by grant from the Crown nor can such right be acquired by prescription The proprietor of an old market has therefore no monopoly or privilege which is entitled to protection and no immunity from competition He has no remedy at law merely because his profits are diminished [9]

[1] *Parmeshari* v *Mahomed* (1881) 6 Cal. 608

Nityahari v *Dunne* (1891) 18 Cal 652 *Chairman of the Serajganj Local Board* v *Budhisuar Patni* (1930) 57 Cal. 1261 The Allahabad High Court has held that ownership of land on both banks at a spot does not give right to owner to open a ferry there as against the Government grantee *Dhanpat Pandey* v *Pasuput Pratap Singh* (1931) 53 All 764

[3] *Shama Durgaji* v *Gangadhar* (1922) 24 Bom L R. 445

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[5] *Hammerton* v *Earl of Dysart* [1916] A. C 57

[6] *Cowes Urban Council* v *Southampton etc Royal Mail Steam Packet Co* [1905] 2 K B 287

[7] *Newton* v *Cubitt* (1859) 5 C B N S 627

[8] *Mosley* v *Walker* (1827) 7 B & C. 40 A market without any definite limit may extend to surrounding locality *Att Gen.* v *Horner* (1885) 11 App Cas. 66

[9] *Hem Chandra Roy Chowdhury* v *Krishna Chandra Saha Sardar* (1920) 47 Cal. 1079 *F D C Sumner* v *Jogendra Kumar* (1932) 34 Cr L. J 334

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Infringement—If a man bring his commodities for sale so near a market as to obtain the benefit of it without paying the toll that is a fraud upon the market, for which an action will lie at the suit of the lord of the market [1]

[1] *Bridgland* v *Shapter* (1839) 5 M & W 375

CHAPTER XVII

TORTS TO PERSONALTY OR MOVABLE PROPERTY

TORTS purely affecting movable property are—

1 Trespass to goods 3 Conversion
2 Trespass *ab initio* 4 Detention

Trespass to goods

An action for trespass to goods lies wherever there has been an actual taking of or a direct and immediate injury to another person's goods.[1] For example removing a tyre from a motor car[2] scratching the panel of a coach[3] The plaintiff must at the time of the trespass have the present possession of the goods either actual or constructive or a legal right to the immediate possession.[4] As against a wrong doer any possession is sufficient provided that it is complete and unequivocal

A person possessed of goods as his property has a good title as against every stranger and one who takes them from him having no title in himself is a wrong doer and cannot defend himself by showing that there was title in some third person for against a wrong doer possession is a title.[5] If however the plaintiff was not in actual possession of the goods at the time of the trespass the proving of a *jus tertii* would afford a good defence to the action even though the defendant acted without the authority of the person entitled to the possession[6]

A joint owner can maintain an action of trespass against his co-owner if the latter has done some act amounting to ouster[7]

DEFENCES

The justifications or defences to an action of trespass are —

1 Self defence or defence of property If a person ha[illegible] possession of goods and another wrongfully attempts to take [illegible] from him, he is justified in using such force as is necessary [illegible]pose of defending his own possession

2 Exercise of one's absolute or *relative* rights.—[illegible] goods of another under a lawful distress for rent or *damage* [illegible] lawful

[1] Bullen.
[2] *G W K Ltd* v *Dunlop Rubber Co Ltd* (1926) 42 T L R 376
[3] *Fouldes* v *Willoughby* (1841) 8 M & W 538 549
[4] *Johnson* v *Diprose* [1893] 1 Q B 512 515 *Smith* v *Milles* (1786) 1 T R. 475
[5] *Jeffries* v *G W Ry* (1856) 5 E & B 802 805 [illegible] *tion Co* v *National* [illegible] A C 197
[6] *Gadsden* v *Ba*[illegible] 514 *Richards* v [illegible] Q B D 544
[7] *Jacobs* v [illegible] 5 H L 464

3 Obedience to some legal or personal authority, e g due process of law (*vide* s 538 Criminal Procedure Code)

4 Negligent or wrongful act of plaintiff himself —If a person place his horse or cart so as to obstruct the right of way, it may be removed even by applying force for that purpose.

5 Recaption is the re taking by a lawful owner of goods of which he has been wrongfully deprived The owner may justify an assault in order to re-possess himself of them [1]

Remedy —Formerly for direct trespass action of trespass for damages for the injury done could be brought For indirect injury resulting from the trespass, an action for trespass on the case was the remedy Now the proper remedy for either is action for damages

Damages —In an action for trespass to goods the damages in general are measured by the value of the goods or the amount of injury done to them Special damage resulting from the immediate loss or injury may also be allowed for if not of too remote a nature.[2]

Quarrying stones on another's land —Where the defendants without leave quarried on the land of the plaintiff and removed a large quantity of stone therefrom it was held that the plaintiff was entitled to recover by way of damages the value of the stone after it was quarried and that the defendants were not entitled to a deduction therefrom of the costs they had incurred in quarrying the stone

2 *Trespass ab initio*

A person who lawfully takes a chattel but afterwards abuses or wastes it renders himself a trespasser *ab initio* A bailiff who took a horse as an astray and used it afterwards was held to be a trespasser *ab initio* [4]

3 *Conversion*

Conversion is a wrongful taking or using or destroying of the goods, or an exercise of dominion over them inconsistent with the title of the lawful owner [5] Dealing with goods in a manner inconsistent with the right of the true owner amounts to a conversion provided there is also an intention on the part of the defendant in so doing to deny the owner's right or to assert a right which is inconsistent with the owner's right.[6]

An act of conversion may be committed—

1 When the property is wrongfully taken
2 When it is wrongfully parted with.

[1] *Blades* v *Higgs* (1861) 10 C. B N S 713

[2] *Hughes* v *Quentin* (1838) 8 C. & P 703 *Gilbertson* v *Richardson* (1848) 5 C. B 502

[3] *Dajiba Anandrav* v *B B & C I Ry* (1869) 6 B H C (A C J) 235 following *Martin* v *Porter* (1839) 5 M & W 351

[4] *Oxley* v *Watts* (1785) 1 T R 12

[5] Bullen *Fouldes* v *Willoughby* (1841) 8 M & W 540

[6] *Lancashire and Yorkshire Ry Co* v *Mac Nicoll* (1918) 88 L J (K B) 601

3 When it is wrongfully sold
4 When it is wrongfully retained.
5 When it is wrongfully destroyed
6 When there is a denial of the lawful owner s right

I CONVERSION BY TAKING

Any one who without authority takes possession of another man s goods with the intention of asserting dominion over them is guilty of conversion The reason is that it is an act inconsistent with the general right of dominion which the owner of the chattel who is entitled to the use of it at all times and in all places has in it A mere taking unaccompanied by an intention to exercise permanent or temporary dominion may be a trespass but is no conversion [1] Merely to receive goods in good faith by way of pledge, sale, or otherwise from a person who has no title to them is not conversion by the recipient He is not liable until he re fuses to deliver them to the true owner or until he wrongfully disposes of them.

If there is a wrongful taking it makes no difference that such acts were done under a mistaken but honest supposition of being lawfully entitled [3] or with the intention of benefiting the true owner [4]

Leading cases—M'COMBIE v DAVIES HILBERY v HATTON

Refusal to deliver property taken from agent—In the first leading case the property of another person was taken by assignment from an agent who had no authority to dispose of it and the person taking it refused to deliver it up to the principal after notice and demand by him It was held that that amounted to conversion [5]

Principal ratifying purchase of chattel by agent—In the second leading case it was held that if a principal ratifies the purchase by his agent of a chattel which the vendor had no right to sell he is guilty of conversion although at the time of the ratification he had no knowledge that the sale was unlawful [6]

Pledgee taking property pledged—Where a pledgee having power to sell for default takes over as if upon a sale to himself the property pledged without the authority of the pledgor but crediting its value in account with him he is liable for conversion [7]

Taking fruit without right—Where a person lopped the branches of fruit trees overhanging his land and appropriated the fruit it was held that as the

[1] *Fouldes v Willoughby* (1841) 8 M & W 540

Spackman v Foster (1883) 11 Q B D 99 *Miller v Dell* [1891] 1 Q B 468 *Union Credit Bank v Mersey Docks and Harbour Board* [1899] 2 Q B 205

[3] *Kleinwort v Comptoir National D'Escompte de Paris* [1894] 2 Q B 157 *Union Credit Bank v Mersey Docks etc* sup

[4] *Hiort v Bott* (1874) L R. 9 Ex 86

[5] *M'Combie v Davies* (1805) 6 East 538

[6] *Hilbery v Hatton* (1864) 2 H & C. 822

[7] *Nickram Dobay v The Bank of Bengal* (1891) 19 Cal. 322 See *Moyi v Muthraman* (1898) 22 Mad. 197

right to lop the branches did not carry with it the right to pick and appropriate the fruit he was guilty of conversion and liable to the owner for its value[1]

2 CONVERSION BY PARTING WITH GOODS

If a man, who is entrusted with the goods of another put them into the hands of a third person contrary to orders it is a conversion. The wrongful act is done when he purports to give to the third person along with the mere possession some right over the property itself The giver and the receiver will be liable as joint tort feasors If a person take another's horse to ride and leave him at an inn that is a conversion for though the owner may have the horse back he has to pay for its keeping[2] Similarly the hirer of a piano who sends it to an auctioneer to be sold is guilty of conversion and so is the auctioneer who refuses to deliver it up unless the expense incurred be first paid[3] If a warehouseman mis delivers goods even by mistake he will be liable for conversion[4]

A the owner of a personal chattel sold a half share to B on a special agreement that A should retain possession until the chattel was sold. A handed it to B to take it to an auction room and B pledged it to defendants to secure a debt. It was held that A had special property in it sufficient to maintain an action of conversion[5]

3 CONVERSION BY SALE

Any person who however innocently obtains possession of the goods of a person who has been fraudulently deprived of them and disposes of them whether for his own benefit or that of any other person, is guilty of conversion[6] Wrongful sale of goods is conversion.[7] The auctioneer who gets possession of the articles sent to be sold by him for the purposes of sale and sells them is liable to the true owner[8] But the sale must be in market overt[9]

The owner of certain household furniture assigned it by a bill of sale to the plaintiffs. Subsequently the assignor employed the defendants a firm of auctioneers, to sell it by auction at her residence The defendants, who had no notice of the bill of sale accordingly sold the furniture and delivered it to the purchasers. It was held that the defendants were liable for conversion[10]

[1] *Mills v Brooker* [1919] 1 K B 555

[2] *Syeds v Hay* (1791) 4 T R 260 264

[3] *Loeschman v Machin* (1818) 2 Stark. 311

[4] *Devereux v Barclay* (1819) 2 B & Ald. 702 *Stephenson v Hart* (1828) 4 Bing 476 *Hiort v Bott* (1874) L. R 9 Ex 86

[5] *Nyberg v Handelaar* [1892] 2 Q B 202.

[6] *Hollins v Fowler* (1875) L. R 7 H L 757 795

[7] *Edwards v Hooper* (1843) 11 M & W 363 *Johnson v Stear* (1863) 15 C B N S 330 *Page v Cowasjee* (1866) L. R 1 P C. 127 *Bullier v Young* (1856) 6 El. & Bl 1

[8] *Delaney v Wallis* (1885) L R 14 Ir C. L. 31 47

[9] *Lancashire Waggon Co v Fitzhugh* (1861) 6 H & N 502.

[10] *Consolidated Company v Curtis & Son* [1892] 1 K. B 495 *Jelks v Hayward* [1905] 2 K B 460 See *Dean v Whittaker* (1821) 1 C & P 347

4 CONVERSION BY KEEPING

If a man has possession of another's chattel and refuses to deliver it up this is an assertion of a right inconsistent with his general dominion over it and the use which at all times and in all places he is entitled to make of it and consequently amounts to an act of conversion.[1]

Demand and refusal—If the goods of a person are in the possession of another he should send some one with proper authority to demand and receive them and if the person in possession refuses to deliver them up this will be evidence of conversion[2] A demand and refusal do not in themselves constitute a conversion but they are evidence of a prior conversion.[3]

An unqualified refusal is always conclusive evidence of a conversion but a qualified reasonable, and justifiable refusal is not[4] But if defendant refuses to deliver up the goods except upon a certain condition which he has no right to impose that is tantamount to an absolute refusal Thus the refusal by a solicitor to give up deeds except on condition which he had no right to impose, that his charges in respect of business done for his own client should be paid would be evidence of conversion[5]

Leading case—ARMORY v DELAMIRIE

In the leading case the plaintiff a chimney sweeper had found a very valuable jewel and had taken it to a jeweller's to ascertain its value The jeweller taking advantage of the boy's simplicity told him it was worthless and offered him three half-pence for it which the lad declined and demanded the jewel back The jeweller refused to do so whereupon the boy successfully sued him for it and the Court considered the jewel to be of the highest value.[6]

Indian cases—Two notes were stolen from A which B (not a *bona fide* holder for valuable consideration) tendered to C in payment of certain articles. C not knowing B refused to deal with him whereupon B brought D who was known to C and the purchase was made by him. It was held that the part which B performed in the transaction amounted to a conversion of the notes to his own use and that he was liable to A[7] A refusal to deliver up an idol whereby the person demanding it was prevented from performing his turn of worship on a specified date was held to give the party aggrieved a right to sue

[1] *Fouldes* v *Willoughby* (1841) 8 M & W 540 548

Thorogood v *Robinson* (1845) 6 Q B 769 *Haryana Cotton Mills Co Ltd* v *B B & C I Ry Co* (1927) 28 P L R 665

[3] *Wilton* v *Girdlestone* (1822) 5 B & Ald 847 *Smith* v *Young* (1808) 1 Camp 439 See *Vaughan* v *Watt* (1840) 6 M & W 492

[4] *Alexander* v *Southey* (1821) 5 B & Ald. 247

[5] *Davies* v *Vernon* (1844) 6 Q B 443 A person having in his possession the good of another whom he knows to be the owner has no right to retain them until he has a written receipt for them *Barnett* v *The Crystal Palace Co* (1861) 2 F & F 443

[6] *Armory* v *Delamirie* (1721) 1 Str 505 See *Soondur Monee Chowdhrain* v *Bhoobun Mohun Chowdhry* (1869) 11 W R 536 where in a suit to recover the value of the plundered property the highest value was assumed.

[7] *Kissorymohun Roy* v *Rajmaram Sen* (1862) 1 Hyde 263 See *Khursedji* v *Pestonji* (1888) 12 Bom. 573

for damages.[1] Refusal or neglect by a railway company to deliver goods after demand made was held to be conversion [2]

CONVERSION BY DESTRUCTION

Destruction of a chattel is an act of conversion for its effect is to deprive the owner of it altogether If the entire article is destroyed as for instance by burning it that would be a taking of the property from the plaintiff and depriving him of it although the defendant might not be considered as appropriating it to his own use

One tenant in common cannot maintain an action against another unless there has been destruction or carrying away of the property or chattel [3]

Taking wine from a cask and filling it with water is a conversion of the whole liquor [4] So is spinning cotton into yarn or grinding corn into flour if done without the authority of the owner [5]

6 CONVERSION BY DENIAL OF RIGHT

There may be a conversion of goods even though the defendant has never been in physical possession of them if his act amounts to an absolute denial and repudiation of the plaintiff's right [6]

Defendant's ignorance of the unauthorized character of his act cannot always be relied upon as a defence.

The payee of a crossed cheque specially indorsed it to the plaintiffs and posted it to them. A stranger having obtained possession of the cheque in transmission, obliterated the indorsement to the plaintiffs and having substituted a special *indorsement to himself presented it at the defendants bank and requested them* to collect it for him They did so and handed the proceeds over to him in France It was held that the defendants were liable to the plaintiffs in an action for conversion for the amount of the cheque [7]

Distinctions between trespass and conversion —

(1) Trespass is essentially a wrong to the actual possessor and therefore cannot be committed by a person in possession Conversion on the other hand is a wrong to the person entitled to immediate possession The actual possessor is frequently but not always the person entitled to immediate possession so that conversion may but does not necessarily include trespass

(2) To damage or meddle with the chattel of another but without intending to exercise an adverse possession over it is a trespass A conver

1 *Debendronath Mullick* v *Odit Churn Mullick* (1878) 3 Cal 390 *Eshan Chunder Roy* v *Monmohini Dassi* (1878) 4 Cal 683

2 *Hayrana Cotton Mills Co Ltd* v *B B & C I Ry Co* (1927) 28 P L R. 665

3 *Harsukh Rai* v *Darshan Singh Bindra* (1931) 13 Lah 555

4 *Richardson* v *Atkinson* (1723) 1 Str 576 See *Phillpott* v *Kelly* (1835) 3 A & E 106

5 Com. Dig Action Trover E

6 *Oakley* v *Lyster* [1931] 1 K B. 148

7 *Kleinwort Sons & Co* v *Comptoir National D'Escompte de Paris* [1897] 2 Q B 157

sion is a breach made adversely in the continuity of the owner's dominion over his goods though the goods may not be hurt

(3) The gist of the action in trespass is the force and direct injury inflicted in conversion it is the deprivation of the use

Action.—The plaintiff at the time of conversion must either have a right of property in the thing coupled with possession or the right of immediate possession thereof[1] Any possession however temporary is sufficient against a wrong-doer e.g that of a carrier A judgment in an action in conversion does not pass the property to defendant unless and until it is satisfied in this respect there is no difference between a judgment in an action in detinue and one in trover or conversion Formerly the remedy was to bring an action in trover for the value (not for the return) of the goods Now an action lies for the value of the goods

DEFENCES

The justifications or defences to an action for conversion are —

1 Lien either general or particular Demand and refusal are not evidence of conversion where the party has a lien upon the chattel[3]

2 Right of stoppage in transit —This defence arises out of contract[4]

3 Denial of plaintiff's right of property, where the plaintiff sues relying on his right only[5] or denial of possession.[6]

Where the plaintiff was in possession of the goods at the time of the conversion the defendant cannot set up a plea of *jus tertii* (i e that a third party has a superior title) Against a wrong doer possession is a good title. But where the plaintiff was not in possession but had only the right to possess the plea of *jus tertii* can be set up by the defendant

4 Sale in market overt —According to English law sale of goods in market overt gives a good title to the purchaser Such a purchaser cannot be sued for conversion if he parts with the goods or refuses to give them up on demand but the seller can be sued if he has no title[7] In India this doctrine does not apply but the case will be governed by s 108 of the Indian Contract Act

Damages —The measure of damages is in general the value of the goods at the time of the conversion where no special damage has been sustained and the goods have not been tendered and received back after action[8] This would be the market value of the goods at the time of

[1] *Gordon v Harper* (1796) 7 T R 9

[2] *Sinnan Chetty v Alagiri Aiyer* (1923) 46 Mad 852

[3] *Stancliffe v Hardwick* (1835) 2 C M & R 1 *Scarfe v Morgan* (1838) 4 M & W 270

[4] See the Indian Contract Act IX of 1872 s. 99

[5] *Butler v Hobson* (1838) 4 Bing N C 290

[6] *Jones v Brown* (1856) 25 L J Ex 345

[7] *Peer v Humphrey* (1835) 2 A & E 495

[8] *Reid v Fairbanks* (1853) 13 C B 692 *Taylor v Mostyn* (1886) 33 Ch D 226 *Morgan v Powell* (1842)

conversion [1] In an action against a shipowner for non delivery of goods the measure of damages is the value of the goods at the date of the non delivery [2]

If the defendant does not produce the article the presumption will be that it is of the highest value of an article of that kind [3] If the goods have been returned but have fallen in price, the difference in the price at the time of the demand by the plaintiff and at the time of the return may be given as damages [4]

4 *Detention*

Detention is the adverse withholding of the goods of another The remedy in English law is an action in detinue It lies for the specific recovery of chattels wrongfully detained from the person entitled to the possession of them and also for the damages occasioned by the wrongful detainer The injury complained of is not the taking nor the misuse and appropriation of the goods, but only the detention The plaintiff must as in conversion have a special and general property and a right to the immediate possession [5] The plaintiff s object is to recover the specific good they must therefore be capable of identification

Detinue considered as a tort does not substantially differ from conversion by detention But in conversion the question of plaintiff s title comes in

3 Q B 278 *Crizzle* v *Olly* (1901) 8 Burma L R. 43 *Bansidhar* v *Sant Lal* (1887) 10 All 133 *Muhammad Mohsin* v *Turab Ali* (1909) 6 A L J 441 Where there is wrongful conversion of goods by an agent the measure of damages is not always the highest market value between the date of conversion and that of the trial but it will depend upon circumstances *Sarareddi* v *Brahmayya* (1929) 29 L. W 419 55 M L J 586

[1] *Henderson & Co* v *Williams* [1895] 1 Q B 521 530 The defendants had wrongfully converted to their own use a box of indigo belonging to the plaintiff The plaintiff sued for the recovery of the box and damages. It was held that the measure of damages was the value of the indigo at the time of the wrongful conversion *minus* its value at the date it was to be returned to the plaintiff *plus* interest at six per cent for the intervening period *Asmal Ali* v *Maula Baksh* (1885) 5 A. W N 200 In an action for wrongful conversion of certain timber the plaintiff claimed to recover as damages the market value of the timber at the town of Rangoon to which it was being conveyed at the time of the conversion It was held that the cost of carriage to Rangoon from the place where the wrongful conversion occurred must be deducted *Bombay Burmah Trading Corporation* v *Mirza Mahomed Ally* (1878) 5 I A 130 4 Cal 116 In an action for damages for the detention of ornaments pledged with the defendant which the defendant wrongfully converted to his own use the measure of damages was held to be the value of ornaments less the sum for which they had been pledged *Hasam Kasam* v *Goma Jadavji* (1868) 5 B H C (O C J) 140

[2] *The Arpad* [1934] P 189

[3] *Armory* v *Delamirie* (1721) 1 Str 504

[4] *Williams* v *Archer* (1847) 5 C. B 318 As to the measure of damages when the plaintiff has special property see *Brierly* v *Kendall* (1852) 17 Q B 937 *The Winkfield* [1902] P 42 *Glenwood Lumber Co* v *Phillips* [1904] A C 405

[5] Bullen.

Action —The plaintiff must prove that he is entitled to possession of the goods, and that he demanded the goods from the defendant, but the defendant refused to deliver them and detained them The detention necessary is an adverse or wrongful detention by the party sued or by his servants or agents

Justification —A lien on the goods by the defendant is a good answer

Damages —Substantial damages will be given for the detention of an article which has fallen in value between the time it was taken and the time it was returned The value of the goods may be assessed at the price they bore in the market at the time of demand by the plaintiff or at the time of trial whichever is the highest[1] The proper measure of damages for wrongful detention of property is the difference between the value of the property when seized and its value when restored[2]

[1] *Archer* v *Williams* (1846) 2 C & K 26

[2] *Nundeeram Sing* v *Inderchand Dogare* (1864) Cor 89 *Shaikh Punju* v *Shaikh Oodoy* (1872) 18 W R 337 See *McIvor* v *Stainbank* (1867) 5 M H C 70

CHAPTER XVIII

TORTS AFFECTING IMMOVABLE AS WELL AS MOVABLE PROPERTY

1 Slander of title
2 Slander of goods.
3 Maintenance
4 Conspiracy

1 *Slander of title*

SLANDER OF TITLE consists of a false, malicious statement in writing printing or by word of mouth injurious to any person s title to property whether movable or immovable, and causing special damage to such person Suppose one having an infirm title to property which he is going to sell or to make the subject of a settlement, and another moved by spite and malice discloses what he believes to be a defect though the information afterwards turns out to be untrue and injury results to the former an action would lie the statement being false and malicious and injurious to the plaintiff [1] If lands or chattels are about to be sold by auction and a man declares in the auction room, or elsewhere that the vendor s title is defective, that the lands are mortgaged or that the chattels are stolen property and so deters people from buying or causes the property to be sold for a less price than it would otherwise have realized this is a slander upon the title of the owner and gives him a *prima facie* claim for compensation in damages [2]

The plaintiff in order to sustain the action must essentially prove[3] —

(1) That the statement is false.[4] If the statement be true if there really be the infirmity in the title that is suggested no action lies It is for the plaintiff to prove it to be false not for the defendant to prove it to be true.[5]

(2) That the statement was made *mala fide* and is malicious, that is with intent to injure the plaintiff [6] or with some indirect or dishonest motive [7] If the statement is made in the *bona fide* assertion of the defendant s own right real or supposed to the property no action lies, e g a *bona fide* notice by a person to prevent a sale on the ground that he has a claim on the estate to be sold [8]

[1] *Pater* v *Baker* (1847) 3 C. B 831 868.

[2] *Gerard* v *Dickinson* (1590) 1 Cro Eliz 196

[3] *See Nemi Chand* v *Wallace* (1907) 34 Cal 495 where the same essentials are laid down

[4] *Brook* v *Rawl* (1849) 4 Ex 531

[5] *Burnett* v *Tak* (1882) 45 L. T 743

[6] *Pater* v *Baker* sup *Halsey* v *Brotherhood* (1881) 19 Ch D 386 *Royal Baking Powder Co* v *Wright Crossley & Co* (1901) 18 R. P C. 95 *British Railway Traffic Co* v *C R C Co* [1922] 2 K. B 260

[7] *Greers Limited* v *Pearman & Corder Limited* (1922) 39 R. P C. 406 417

[8] *Hargrave* v *Le Breton* (1759) 4 Bur 2422 *Blackham* v *Pugh* (1816) 2 C. B 611, *Pitt* v *Donovan* (1813) 1 Maud & Sel 639

(3) That the words go to defeat his title to property The property may be either real or personal and the plaintiff's interest therein may be either in possession or reversion

(4) That special damage has resulted from the slander The special damage must always be such as naturally or reasonably arises from the use of the words [1]

The medium through which the slander is conveyed that is whether it be through words or writing or print is immaterial though where the slander of title is conveyed in a letter or other publication the damage in consequence is more likely to be serious than where the slander of title is by words only [2]

An action for slander of title differs from an action of defamation in several respects —

(1) The words are not defamatory they do not disparage the plaintiff's moral character or his solvency skill business capacity etc they are merely attack on sometning or on his title to something

(2) The words are equally actionable whether written or spoken

(3) Special damage must in all cases be proved

(4) There is no presumption that the words are untrue the *onus* lies on the plaintiff to prove them untrue

(5) Malice is not presumed the plaintiff must give some *prima facie* evidence that the defendant acted maliciously or at all events without lawful occasion or reasonable cause

(6) A right of action for defamatory words dies with the person defamed but this action survives to an executor to the extent that any damage can be shown to the estate of the deceased [3]

Leading case—MALACHY v SOPER

Silver mine shares—In the leading case the plaintiff was possessed of certain shares in a silver mine touching which shares certain claimants had filed a bill in Chancery to which the plaintiff had demurred. It was held that, without alleging special damage the plaintiff could not sue the defendant for falsely publishing that the demurrer had been overruled that the prayer of the petition (for the appointment of a receiver) had been granted and that persons duly authorized had arrived at the mine [4]

Using name of another's hotel on coaches—Where defendants coach owners used the name of a hotel on their coaches and the drivers caps so as to suggest that they were authorized and employed by the hotel keeper to ply between the hotel and the railway station but the plaintiffs were the coach owners authorized and employed by the hotel it was held that the defendants must not falsely hold themselves out as having the patronage of the hotel

1 *Haddan* v *Lott* (1854) 15 C B 411 *Malachy* v *Soper* (1836) 3 Bing N C 371 *Mohammad Din* v *Sant Ram* (1938) 40 I L R 158

2 *Malachy* v *Soper* sup

3 *Hatchard* v *Mege* (1887) 18 Q B D 771

4 *Malachy* v *Soper* sup p 286

though they could freely compete with the plaintiffs for the carriage of passengers and goods to the hotel and could advertise their intention of so doing in any honest way [1]

Damages —The special damage must be proved and that will in part be the measure of damages this damage may consist in the property having on a sale realized a less price than it otherwise would or in the owner being put to other necessary expenses in consequence.

2 *Slander of goods*

Slander of goods consists of a false statement disparaging a man's goods published maliciously and causing him special damage. This is also known as trade libel

To maintain an action for slander of goods it is necessary to prove—

(1) That the defendant disparaged the plaintiff's goods
(2) That such disparagement was false
(3) That it was made maliciously and
(4) That special damage had resulted thereby [2]

Where the Court can see that the words published by the defendant are reasonably likely to produce a diminution of the plaintiff's business evidence of a general loss of business as distinct from evidence of the loss of particular known customers is sufficient [3]

A statement by a trader that his own goods are superior to those of another trader even if untrue and the cause of loss to the other trader gives no cause of action An allegation that such a statement was made maliciously could not convert a statement *prima facie* lawful into one *prima facie* unlawful and proof of special damage would be of no avail [4]

Leading case—RATCLIFFE v EVANS

The plaintiff had for many years carried on the business of an engineer and boiler maker under the name of Ratcliffe & Sons The defendant published in his newspaper falsely and maliciously that the plaintiff had ceased to carry on his business and that the firm of Ratcliffe & Sons did not then exist. It was held that the defendant was liable and that evidence of general loss of business was sufficient to support the action [5]

W the proprietor of Vance's food for infants, etc. bought from Mellin and sold to his customers Mellin's Food. W affixed to the wrappers on Mellin's food a label stating that Vance's food was far more nutritious and healthful than any other It was not proved that the statement was untrue or that it had caused any damage to the plaintiff It was held that W's conduct did not amount to a

[1] *Marsh* v *Billings* Big L. C 49 7 Cush 322

[2] *Western Counties Manure Co* v *Lawes Chemical Manure Co* (1874) L. R 9 Ex 218 *White* v *Mellin* [1895] A. C. 154 *Ratcliffe* v *Evans* [1892] 2 Q B 524 *Wren* v *Weild* (1869) L. R. 4 Q B 730

[3] *Ratcliffe* v *Evans* sup The precise words complained of must be set out in the statement of claim *Imperial Tobacco Co* v *Bonnan* (1927) 46 C. L J 455

[4] *Hubbock & Sons* v *Wilkinson Heywood & Clark* [1899] 1 Q B. 86.

[5] *Ratcliffe* v *Evans* sup

trade libel but was merely a puff by a rival trader[1] The plaintiff and the defendant were the owners of newspapers circulating in the same locality and the defendant published a statement, which was untrue that the circulation of his newspaper is 20 to 1 of any other weekly paper in the district and where other count by the dozen we count by the hundred It was held that those statements were not a mere puff but amounted to an untrue disparagement of the plaintiff's newspaper and were actionable on proof of actual damage[2]

3 *Maintenance*

Maintenance is the officious assistance by money or otherwise proffered by a third person to either party to a suit in which he himself has no legal interest to enable them to prosecute or defend it[3] The essence of the offence is intermeddling with litigation in which the intermeddler has no concern.[4] It is against public policy that litigation should be promoted and supported by those who have no concern in it

If a person agrees to maintain a suit in which he has no interest the proceeding is known as maintenance if he bargains for a share of the result to be ultimately decreed in a suit in consideration of assisting in its maintenance, it is styled champerty[5] Every champerty (*campipartitio*) is maintenance but every maintenance is not champerty for champerty is but a species of maintenance which is the genus

The law of maintenance is confined to cases where a man improperly and for the purpose of stirring up litigation and strife encourages others to bring actions or to make defences which they have no right to make. No encouragement should be given to litigation by the introduction of parties to enforce those rights which others are not disposed to enforce[6]

An action for damages for maintenance will not lie in the absence of proof of special damage.[7] The success of the maintained litigation whether an action or a defence is not a bar to the right of action for maintenance.[8]

In two cases the maintenance of a suit is lawful—

(1) Where the person maintaining has an interest in the subject matter of the action,[9] e g a master for a servant or a servant for a master an heir a brother a son in law a brother in law a landlord defending his tenant in a suit for titles. But in all these cases the interest spoken of is an actual valuable interest in the result of the suit itself

[1] *White v Mellin* [1895] A C 154 Publication of placards containing false statements injurious to trade can be restrained by injunction *Collard v Marshall* [1892] 1 Ch. 571

[2] *Lyne v Nicholls* (1906) 23 T L. R. 86

[3] Blackstone iv c. 10 s. 12 See *Bradlaugh v Newdegate* (1883) 11 Q B D 1 where several definitions are quoted with approval

[4] Per Lord Finlay in *Neville v London Express Newspaper Ltd* [1919] A C 368 385

[5] *Spyre v Porter* (1856) 26 L. J Q B 64

[6] Per Lord Abinger C. B in *Prosser v Edmonds* (1835) 1 Y & C. 481

[7] *Neville v London Express Newspaper Ltd* sup

[8] *Ibid*

[9] *Guy v Churchill* (1888) 40 Ch. D 481

either present or contingent or future or the interest which consanguinity or affinity to the suitor gives to the man who aids him or the interest arising from the connection of the parties [1]

(2) Where the maintainer assisted the third person from charitable motives believing that he was a poor man oppressed by a rich man [2] or from religious sympathy [3]

The doctrine as to maintenance of civil suits is not applicable to criminal proceedings Every member of the public may set the criminal law in motion and he is not liable unless the prosecution is malicious [4]

Leading case—BRADLAUGH v NEWDEGATE

In this case the plaintiff having sat and voted as a member of Parliament without having made and subscribed the oath appointed by a statute the defendant also a member of Parliament procured C to sue the plaintiff for the penalty imposed by that statute for contravention thereof C was a person of insufficient means to pay the costs in the event of the action being unsuccessful After the commencement of the action the defendant gave to C a bond of indemnity against all costs and expenses he might incur in consequence of the action It was held that the defendant and C had no common interest in the result of the action for the penalty that the conduct of the defendant in respect of such action amounted to maintenance and that the action for maintenance was maintainable [5]

Indian law —The English law of maintenance and champerty is not in force as specific law in India either in the mofussil or in the Presidency towns [6] A fair agreement to supply funds to carry on a suit, in consideration of the lender having a share of the property sued for if recovered is not to be regarded as necessarily opposed to public policy or merely, on this ground void But in agreements of the kind the questions are —

(*a*) whether the agreement is extortionate and unconscionable so as to be inequitable against the borrower or

(*b*) whether the agreement has been made, not with the *bona fide* object of assisting a claim believed to be just and of obtaining reasonable compensation therefor but for improper objects as for the purpose of gambling in litigation, or of injuring others so as to be for these reasons, contrary to public policy

In either of these cases effect is not to be given to the agreement [7]

[1] Per Lord Coleridge C J in *Bradlaugh v Newdegate* (1883) 11 Q B D 1 *Alabaster v Harness* [1895] 1 Q B 339

[2] *Harris v Brisco* (1886) 17 Q B D 504

[3] *Holden v Thompson* [1907] 2 K B 489

[4] *Grant v Thompson* (1895) 72 L T 264 18 Cox 100

[5] *Bradlaugh v Newdegate* sup

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[7] *Ram Coomar v Chander Canto* sup *Raja Mohkam v Raja Rup Singh* (1893) 23 I A 127 15 All 352

To make such agreements void there must be something against good policy and justice, something tending to promote unnecessary litigation something that in a legal sense is immoral and to the constitution of which a bad motive in the same sense is necessary [1] The Courts will consider whether the transaction is merely the acquisition of an interest in the subject of litigation *bona fide* entered into or whether it is an unfair or illegitimate transaction got up for the purpose merely of spoil or of litigation, disturbing the peace of families and carried on from a corrupt or other improper motive

4 *Conspiracy*

A conspiracy is an unlawful combination of two or more persons to do that which is contrary to law or to do that which is wrongful and harmful towards another person or to carry out an object not in itself unlawful by unlawful means [3] It consists in the agreement of two or more to do an unlawful act or to do a lawful act by unlawful means [4] It is not necessary in order to constitute a conspiracy that the acts agreed to be done should be acts which if done should be criminal It is enough if the acts agreed to be done although not criminal are wrongful that i amount to a civil wrong [5]

The mere act of conspiracy is not the subject of a civil action To sustain an action special damage must be proved [6] It is the damage

Raghunath v Nil Kanth (1893) 20 Cal 843 P C *Debi Dayal Sahoo v Bhan Pertap Singh* (1903) 31 Cal 433 *Lal Akhal Ram v Raja Kazim Hussain Khan* (1905) 32 I A 113 9 C W N 477 *Gossain Ramdhan v Gossain Dalmir* (1909) 14 C W N 191 *Baldeo Sahi v Harbans* (1911) 33 All 626 *Dhallu Missar v Jiwan Singh* (1894) P R No 79 of 1894 *Steuart v Ram Chand* (1906) P R No 26 of 1906 *Indar Singh v Munshi* (1919) 1 Lah 124 *U Pe Gyi v Maung Thein Shin* (1923) 1 Ran 565 *Amrita Lal Baiysa v Pratap Chandra Chakrabarty* (1929) 52 C L J 492 *Abadi Begam Rani v Muhammad Khalil Khan* (1930) 6 Luck 282 *Valuri Ramanamma v Marina Viranna* (1931) 33 Bom L R 960 P C *Kalimuthu v Maung Tha Din* (1936) 14 Ran 392 *Bisheshwar Prasad v Jang Bahadur* (1936) 12 Luck 339

[1] *Fischer v Kamala Naicker* (1860) 8 M I A 170 187 *Gholam v Wali dad* (1870) P R No 70 of 1870

[2] *Chedambara v Renga Krishna* (1874) 13 Beng L R 509 526 P C *Virabhadra v Guruvenkata* (1898) 22 Mad 312 *Gopal v Gangaram* (1889) 14 Bom 72 *Ahmedbhoy v Vulleebhoy* (1884) 8 Bom 323 *Siba Ramayya v Chamma* (1899) 9 M L J 17 *Chunilal v Parbhudas* (1897) P J 258 *Debi Dayal Sahoo v Bhan Pertap Singh* (1903) 31 Cal 433

[3] Per Lord Brampton in *Quinn v Leathem* [1901] A C 495 528 *Mogul Steamship Co v McGregor* [1892] A C 25 *Allen v Flood* [1898] A C 1

[4] Per Willes J in *Mulcahy v The Queen* (1868) L R 3 H L 306 317 In such a proceeding it is necessary for the plaintiff to prove a design common to the defendant and to others to damage the plaintiff without just cause or excuse *Sweeney v Coote* [1907] A C 221

[5] *R v Warburton* (1870) L R 1 C C R 274 An action will lie for malicious injury to property (e g cutting down of trees) by parties of men acting in concert with intent to overthrow all law and all security to property *Marquis of Lansdowne v Kerry Co Council* [1925] 2 I R 87

[6] *Quinn v Leathem sup* p 529 *Ware & Sons Ltd v London Society of Compositors* [1913]

either present or contingent or future or the interest which consanguinity or affinity to the suitor gives to the man who aids him or the interest arising from the connection of the parties [1]

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[6] *Quinn v Leathem* sup p 529 *Vacher & Sons Ltd v London Society of Compositors* [1913]

wrongfully done and not the conspiracy that is the gist of action for conspiracy Thus, where several persons combine to hiss an actor or to boycott a tradesman or merchant the element of combination is part and parcel of the wrong since the damage could not have occurred without it. The illegal or malicious combination is then the gist of the wrong In all such cases it will be found that there existed either an ultimate object of malice, or wrong or wrongful means of execution involving elements of injury to the public or at least negativing the pursuit of a lawful object [1]

In *Mogul Steamship Co s* case[2] it is laid down that no action for a conspiracy lies against persons who act in concert to damage another and do damage him but who at the same time merely exercise their own rights by lawful means and who infringe no rights of other people. Thus acts done by X and Y who are acting in concert solely for the purpose of protecting and extending their trade and increasing their profits and which do not involve the employment of any means in themselves unlawful are not actionable even though these acts cause damage to A In other words trade competition carried out to an extreme length is even though it cause damage to A not actionable provided that his competitors are acting solely with the lawful object of securing successes in trade and use no unlawful means [3]

While combination of different persons in pursuit of a trade object is lawful although resulting in such injury to others as may be caused by legitimate competition in labour yet that combination for no such object but in pursuit merely of a malicious purpose to injure another would be clearly unlawful [4] Where the acts complained of are in pursuance of a combination or conspiracy to injure or ruin another and not to advance the party s own trade interests and injury has resulted an action will lie [5]

Quinn v *Leathem* holds that a combination of two or more

A C. 107 122 See *Weston* v *Peary Mohan Dass* (1912) 40 Cal 898

[1] Per Lord Field in *Mogul Steamship Co* v *McGregor* [1892] A. C. 25 52 A mere conspiracy to injure a man without an overt act resulting in the injury does not furnish any cause of action *A conspiracy is not* illegal unless it results in an act done which by itself would give a cause of action *Templeton* v *Laurie* (1900) 2 Bom. L. R 244 623 25 Bom 230 Malice is essential to the giving of a good cause of action *Khimji Vasanji* v *Narsi Dhanji* (1914) 17 Bom. L. R 225

[2] [1892] A C. 25

[3] *Ibid* pp 40 44 judgment of Lord Watson, p 59 judgment of Lord Hannen and (1889) 23 Q B D 613 614 judgment of Bowen L J See *Ware and De Freville Ltd* v *Motor Trade Association* [1921] 3 K B 40 publication of the plaintiff s name in the stop list done *bona fide* in the protection of trade interests of the members *of the association* was not unlawful

[4] Per Lord Shand in *Quinn* v *Leathem* [1901] A C. 495 512 *Allen* v *Flood* [1898] A C. 1 See *Pratt* v *British Medical Association* [1919] 1 K B 244 and its criticism in *Ware and De Freville Ld* v *Motor Trade Association* sup

[5] *Quinn* v *Leathem* sup. p 513

without justification or excuse to injure a man in his trade by inducing his customers or servants to break their contracts with him, or not to deal with him, or continue in his employment is if it results in damage to him, actionable A person has a right to carry on his own business as long as he does not break the law in the way he himself prefers Hence, it is the legal duty of third persons not to use intimidation or coercion towards him or his customers with a view to prevent him from carrying on his business in the way he chooses [1] A conspiracy to cause a breach of contract is not in itself a cause of action unless the intended breach of contract results from it

A conspiracy to injure—an oppressive combination—differs widely from an invasion of civil rights by a single individual [3] A number of actions and things not in themselves actionable or unlawful if done separately without conspiracy may with conspiracy become dangerous and alarming just as a grain of gunpowder is harmless but a pound may be highly destructive or the administration of one grain of a particular drug may be most beneficial as a medicine but administered frequently and in large quantities with a view to harm may be fatal as a poison [4] It is said that conduct which is not actionable on the part of one person cannot be actionable if it is that of several acting in concert This may be so where many do no more than one is supposed to do But numbers may annoy and coerce where one may not Annoyance and coercion by many may be so intolerable as to become actionable and produce a result which one alone could not produce [5]

These observations overrule the view that a conspiracy to do certain acts gives a right of action only where the acts agreed to be done and in fact done would had they been without preconcert have involved a civil injury to the plaintiff for which he would have had a right of action [6] The effect of *Quinn* v *Leathem* is however nullified so far as trade unions are concerned by the Trade Disputes Act 1906 [7]

[1] *Quinn* v *Leathem* [1901] A C 495 536-38 judgment of Lord Lindley
De Jetley Marks v *Greenwood* [1936] 1 All E R 863

[3] *Quinn* v *Leathem* sup p 511 *Mogul Steamship Co* v *McGregor* (1889) 23 Q B D 598 613 616

[4] Per Lord Brampton in *Quinn* v *Leathem* sup pp 529 530

[5] Per Lord Lindley in *Quinn* v *Leathem* sup p 538 See similar remarks in *South Wales Miners Federation* v *Glamorgan Coal Co* [1905] A C 239 252 See *Weston* v *Peary Mohan Dass* (1912) 40 Cal 898

[6] *Huttley* v *Simmons* [1898] 1 Q B 181 following *Kearney* v *Lloyd* (1889) 26 L R Ir 268 and *Cotterell* v *Jones* (1851) 11 C B 713 See the comments on *Huttley's* case by Lord Lindley in *Quinn* v *Leathem* sup. See *Valentine* v *Hyde* [1919] 2 Ch 129 149 which seems to support the decision in *Huttley* v *Simmons*

[7] 6 Edw VII s. 47 This Act declares that an action against a trade union in respect of any tortious act alleged to have been committed by or on behalf of the trade union shall not be entertained by any Court. Section 1 of this Act provides that an act done in pursuance of an agreement or combination by two or more persons shall if done in pursuance of an agreement or combination by two or more persons shall if done in contemplation or furtherance of a trade dispute not be

Sorrell v *Smith*[1] lays down (1) a combination of two or more persons wilfully to injure a man in his trade is unlawful and if it results in damage to him is actionable (2) If the real purpose of the combination is, not to injure another but to forward or defend the trade of those who enter into it then no wrong is committed and no action will lie although damage to another ensues provided that the purpose is not effected by unlawful means such as violence or threat of violence or fraud A threat to effect a purpose which is in itself lawful gives no right of action to the person thereby injured

Putting the name of a member or a non member on the Stop List by a trading association in good faith and in furtherance or protection of its legitimate trade interests is not unlawful[2] A trade association which by its constitution is entitled to put on a Stop List the name of a member or other person who has infringed its rule forbidding the sale of articles at other than the list prices relevant thereto may instead of putting the name of that member or other person on the Stop List require him in furtherance of its trade interests, to pay a sum of money within reasonable limits[3]

In the *Mogul Steamship* case what the combination did was done in the way of commercial competition In *Allen* v *Flood* the conduct of the defendant was not actionable as his object was to promote his own trade interest however malicious or bad his motive might have been In *Quinn* v *Leathem* there was a deliberate intention to injure. In *Sorrell's* case as well as in *Thorne's* case the essential features were the absence of an intent to injure and the presence of the purpose to promote *legitimate* trade interests

Where workmen strike in breach of their contracts those who help to

actionable unless the act if done without such agreement or combination would be actionable Section 2 legalizes peaceful picketing Section 3 encroaches upon the law a laid down in *Quinn* v *Leathem* It takes away the actionable character of any act done by a person in contemplation or furtherance of a trade dispute if the ground of action is only that what was done induced another person to break a contract of employment or was an interference with the trade business or employment of another person or with his right to dispose of his capital or his labour as he pleases Section 4 enacts that an action against a trade union in respect of any tortious act shall not be entertained by any Court. See *Vacher & Sons Ltd* v *London Society of Compositors* [1913] A C. 107 See *Conway* v *Wade* [1909] A C. 506 where it is held that if there is no trade dispute an action for damages will lie for inducing the plaintiff's employers to dismiss him

[1] [1925] A C. 700, 712-714 *Imperial Tobacco Co* v *Bonnar* (1927) 46 C L J 455

[2] *Ware & De Freville* v *Motor Trade Association* [1921] 3 K B 40

[3] *Thorne* v *Motor Trade Association* [1937] A C. 797 *Hardie and Lane Ld* v *Chilton* [1928] 2 K B 306 In *Thorne's* case the question was whether to ask for such payment was not in itself a demand of money with menaces and without reasonable and probable cause within s. 29 sub-s.1(i) of the Larceny Act 1916 The House of Lords held that it was not as the act of the defendants amounted to promotion of lawful business interests

maintain the strike by money and counsel are not liable to pay damages to the employers merely because losses are thereby caused to the employers [1]

The Allahabad High Court has laid down in *Bholanath s* case the following propositions after reviewing the English case law —

(1) Every person has a right to a free course of trade and to conduct his business upon his own lines even though it results in an interference with the business of another person to his detriment

(2) If a person or a combination of persons *unlawfully* procure a breach of contract the matter is actionable provided that damage accrues therefrom

(3) Malice in the sense of spite or ill feeling is not the gist of the action An act that is legal in itself does not become illegal because i is prompted by an indirect or a sinister motive

(4) Even though the dominating motive in a certain course of action may be the furtherance of one s business or of one s interest one is not entitled to interfere with another man s method of earning his living by illegal means Illegal means may either be means that are illegal in themselves or that may become illegal because of conspiracy where they would not have been illegal if done by a single individual

(5) An unlawful interference with the business of another person with intent to hurt that person is actionable provided that damage results from the interference A lawful interference by unlawful methods with the same object and producing similar results is equally actionable

Leading cases —MOGUL STEAMSHIP CO v MCGREGOR ALLEN v FLOOD QUINN v LEATHEM SORRELL v SMITH

In the first case the defendants, who were firms of hipowners trading between China and Europe with a view to obtaining for themselves a monopoly of the homeward tea trade and thereby keeping up the rate of freight formed themselves into an association and offered to such merchants and shippers in China as shipped their tea exclusively in vessels belonging to members of the association a rebate of five per cent on all freights paid by them The plaintiffs who were rival shipowners trading between China and Europe were excluded by the defendants from all the benefits of the association and in consequence of such exclusion sustained damage. In an action for damages alleging conspiracy to injure the plaintiffs, it was held that since the acts of the defendants were done with the lawful object of protecting and extending their trade and increasing their profits and since they had not employed any unlawful means the plaintiffs had no cause of action [3]

In the second case the respondents who were shipwrights were employed to repair the woodwork of a ship Some ironworkers who were employed on the ironwork of the ship objected to the respondents being employed, on the ground that the respondents had previously worked at ironwork on a ship for another

[1] *Denaby & Cadeby Main Collieries* v *Yorkshire Miners Association* [1906] A C 384
Bholanath Shankar Das v *Lachmi Narain* (1930) 53 All. 316 332

[3] *Mogul Steamship Co* v *McGregor* [1892] A C. 25 followed in *Reynolds* v *Shipping Federation Ltd* [1923] 1 Ch. 28.

Sorrell v *Smith*[1] lays down (1) a combination of two or more persons wilfully to injure a man in his trade is unlawful and if it results in damage to him is actionable (2) If the real purpose of the combination is not to injure another but to forward or defend the trade of those who enter into it then no wrong is committed and no action will lie although damage to another ensues provided that the purpose is not effected by unlawful means such as violence or threat of violence or fraud A threat to effect a purpose which is in itself lawful gives no right of action to the person thereby injured

Putting the name of a member or a non member on the Stop List by a trading association in good faith and in furtherance or protection of its legitimate trade interests is not unlawful[2] A trade association which by its constitution is entitled to put on a Stop List the name of a member or other person who has infringed its rule forbidding the sale of articles at other than the list prices relevant thereto may instead of putting the name of that member or other person on the Stop List, require him, in furtherance of its trade interests, to pay a sum of money within reasonable limits[3]

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maintain the strike by money and counsel are not liable to pay damages to the employers merely because losses are thereby caused to the employers [1]

The Allahabad High Court has laid down in *Bholanath s* case the following propositions after reviewing the English case law —

(1) Every person has a right to a free course of trade and to conduct his business upon his own lines even though it results in an interference with the business of another person to his detriment

(2) If a person or a combination of persons *unlawfully* procure a breach of contract the matter is actionable provided that damage accrues therefrom

(3) Malice in the sense of spite or ill feeling is not the gist of the action An act that is legal in itself does not become illegal because it is prompted by an indirect or a sinister motive

(4) Even though the dominating motive in a certain course of action may be the furtherance of one s business or of one s interest one is *not entitled to interfere with another man s method of earning his living* by illegal means Illegal means may either be means that are illegal in themselves or that may become illegal because of conspiracy where they would not have been illegal if done by a single individual

(5) An unlawful interference with the business of another person with intent to hurt that person is actionable provided that damage results from the interference A lawful interference by unlawful methods with the same object and producing similar results is equally actionable

Leading cases—MOGUL STEAMSHIP CO *v* MCGREGOR ALLEN *v* FLOOD QUINN *v* LEATHEM SORRELL *v* SMITH

In the first case the defendants who were firms of shipowners trading between China and Europe with a view to obtaining for themselves a monopoly of the homeward tea trad and thereby keeping up the rate of freight formed them selves into an association and offered to such merchants and shippers in China as shipped their tea exclusively in vessels belonging to members of the association a rebate of five per cent on all freights paid by them The plaintiffs who were rival shipowners trading between China and Europe were excluded by the defendants from all the benefits of the association and in consequence of such exclusion sustained damage. In an action for damages alleging conspiracy to injure the plaintiffs, it was held that since the acts of the defendants were done with the lawful object of protecting and extending their trade and increasing their profits and since they had not employed any unlawful means the plaintiffs had no cause of action [3]

In the second case the respondents who were shipwrights were employed to repair the woodwork of a ship Some ironworkers who were employed on the ironwork of the ship objected to the respondents being employed on the ground that the respondents had previously worked at ironwork on a ship for another

1 *Denaby & Cadeby Main Collieries* v *Yorkshire Miners Association* [1906] A C 384

Bholanath Shankar Das v *Lachmi Narain* (1930) 53 All. 316 332

3 *Mogul Steamship Co* v *McGregor* [1892] A C 25 followed in *Reynolds* v *Shipping Federation Ltd* [1923] 1 Ch 28.

firm the practice of shipwrights working on iron being resisted by trade union of which the ironworkers were members The appellant who was a delegate of the union informed the employers that unless the respondents were discharged all the ironworkers would be called out or knocked off the work This was done to punish the respondents for what they had done in the past The employers, in fear of this threat being carried out which would have stopped their business discharged the respondents and refused to employ them again The respondents brought an action against the appellant It was held that the appellant had violated no legal right of the respondents, done no unlawful act and used no unlawful means, in procuring the respondents dismissal and that his conduct was not actionable however malicious or bad his motive might be.[1] The actual decision in this case is that an act lawful in itself is not converted by a bad or malicious motive into an unlawful act. The purpose of the defendant was to promote his own trade interest which he was entitled to do although injurious to his competitors.

A trade union of retail news-agents advocated the policy of limiting the number of retail newspaper shops in a given area and enforced that policy by procuring its members to withdraw their custom from any wholesale news agent who supplied newspapers to a retailer opening a new shop without its permission. Certain new comers in a district having opened shops without the union s permission and obtained supplies of newspapers from a wholesale news-agent R the plaintiff who was a customer of R at the request of the union of which he was a member withdrew his custom from R and transferred it to another wholesale news-agent W The defendants a committee representing the proprietors of the newspapers who took the view that the union s policy was injurious to the interests of their trade intervened at the request of R and, in order to compel the plaintiff to return to R as a customer threatened to discontinue the supply of those newspapers which W obtained directly from them. The defendants acted for the sole purpose of protecting their trade and were not actuated by spite against the plaintiff or by any desire to injure him. In an action to restrain the defendants from interfering with the right of the plaintiff to continue contractual relations with W it was held that the defendants had not committed or threatened to commit any wrong against the plaintiff and that the action *failed*.[2]

Maliciously inducing persons to break or not to enter into contracts with others —The defendants were members of a joint committee of three trade unions. A firm of builders having refused to obey certain rules laid down by the unions with regard to the building operations, the unions sought to compel them to do so by preventing the *supply of* building materials to them. They therefore requested the plaintiff who supplied building materials to the firm to cease to supply them with such materials but the plaintiff refused to do so. Thereupon with the object of injuring the plaintiff in his business, in order to compel him to comply with such request the defendants induced persons who had entered into contracts with the plaintiff for the supply of materials to break their contracts, and not to enter into further contracts with the plaintiff by threatening that the workmen would be withdrawn from their employ The plaintiff sustained damage in consequence of such breaches of contracts, and of

[1] *Allen v Flood and Taylor* [1898] A C. 1 [2] *Sorrell v Smith* [1925] A C 700

the refusal of such persons to enter into contracts with him. It was held that an action was maintainable by the plaintiff against the defendants for maliciously procuring such breaches of contracts and also for maliciously conspiring together to injure him by preventing persons from entering into contracts with him.[1] The plaintiff entered into a contract by which he was apprenticed to his employers to learn certain work. A friendly society of workmen engaged in similar work protested to the employers against the engagement of the plaintiff as an apprentice, on the ground that it was a breach of one of the rules of the society which the employers had agreed to and signed and they gave notice that, if the engagement was continued they would call out the workmen who were working for the employers, and who were all members of the society In consequence of this threat the employers refused to continue to teach the plaintiff under the terms of the deed of apprenticeship In an action by him against the society and certain of the officers it was held that he had a good cause of action to which the previous agreement between the society and the employers was no answer[2] Where the master of a ship intentionally fired a cannon at negroes off the coast of Africa, and thereby prevented them from trading with the plaintiffs it was held that an action would lie against the master[3] Similarly a person who by threats of corporal hurt and of vexatious litigation prevented customers from dealing with, and workmen from labouring for the plaintiff was held liable.[4]

Breach of marriage contract—The plaintiff betrothed his son to one J Some time after the betrothal J s father married her to defendant. The plaintiff and his son sued defendant and his two sisters to recover damages alleging that the defendants conspired together to procure the breach of the contract of marriage It was held that the suit was not maintainable as the alleged conspiracy was not proved and that the defendant did not know of the betrothal before his marriage.[5]

Maliciously preventing a person from acting—The plaintiff being about to perform as an actor at a theatre the defendants with other persons maliciously conspired to prevent him from acquiring fame and profit in that performance They in pursuance of such conspiracy hired persons to hoot, hiss groan and yell at the plaintiff during the performance and who accordingly attended the theatre for that purpose. The plaintiff appeared in character upon the stage, and thereupon the defendants, with other persons, hissed and hooted the plaintiff so as to compel him to desist from the performance and thereby caused the plaintiff to lose his engagement. It was held that a good cause of action was shown.[6]

Combination among bidders at an auction—The Calcutta High Court has held that a combination among bidders at an auction not

1 *Temperton* v *Russell* [1893] 1 Q B 715 *J Lyons & Sons* v *Wilkins* [1899] 1 Ch 255

2 *Read* v *Friendly Society etc* [1902] 2 K B 732 See *Denaby & Cadeby Main Collieries Ltd* v *York shire Miners Association* [1906] A. C. 381

3 *Tarleton* v *M Gowley* (1794) 1 Peake N P C 270

4 *Garrett* v *Taylor* (1623) 3 Cro Jac 567

5 *Khimji Vasanji* v *Narsi Dh* (1914) 17 Bom. L. R. 225 See *Jekinsandas* v *Ranchoddas* (19 Bom L. R. 12

6 *Gregory* v *Duke of* (1843) 6 M & G 205

to bid against each other even if the combination amounts to a knock out does not give rise to an action[1] Fletcher J differed from a previous decision in which it was held that there was a distinction between an honest combination among intending purchasers and a dishonest concert for the suppression of all competition Mookerjee J in an earlier decision[2] had observed The test in each case is what was the object of the agreement among the bidders it is the end to be accomplished which determines whether a combination is lawful or otherwise If the object be to obtain the property as a sacrifice by artifice the combination is fraudulent if the object be to make a fair bargain or even to divide the property for the accommodation of the purchasers the combination cannot be said to be fraudulent

1 *Jyoti Prokash Nandi* v *Jhoumull Johurry* (1908) 36 Cal 134 *Mahomed* v *Savuasi* (1900) 2 Bom L R 640 P C
In England certain bidding agreements are declared illegal by the Auctions (Bidding Agreements) Act 1927 (17 & 18 Geo V c 12)

2 *Ambika Prasad Singh* v *Whitwell* (1907) 6 C L J 111 115 See *Mahomed* v *Savuasi* sup p 643 *Maung Sein Htin* v *Chee Pan Ngaw* (1925) 3 Ran 275

CHAPTER XIX

TORTS TO INCORPOREAL PERSONAL PROPERTY

1 Patent	3 Trade mark
2 Copyright	4 Trade name

I *Patent*

A PATENT is a privilege granted by the Crown to the first inventor of any new manufacture or invention that he and his licensees shall have the sole right, during the term of sixteen years of making and vending such manufacture, or invention In England the Patents and Designs Act[1] governs actions relating to patents in India the Indian Patents and Designs Act applies

The subject matter of a patent must be a new manufacture or art for if there is no new manufacture or art there is no subject matter and therefore no invention[3] It is sufficient that the invention is new within the realm so that no objection can be made that it was already known abroad or in the colonies.[4] The two features necessary to the validity of a patent are novelty and utility but the real test is the novelty of the invention. Novelty is essential for otherwise there would be no benefit given to the public and consequently no consideration moving from the patentee[5]

The patentee may use his rights himself or assign them or grant licences A licensee cannot sue for infringement

Infringement—A patent privilege may be infringed if any person without the licence of the patentee makes uses exercises or vends the invention within the prescribed limits If any person infringes the patent he will be liable to an action for damages and an injunction The Crown is bound by patent statutes but provision is made for the use of inventions by Government departments on exceptional terms[6]

Damages—The plaintiff is entitled to recover such an amount of damages as will fairly compensate him for the pecuniary loss actually sustained by the patentee[7]

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[1] 7 Edw VII c 29 as amended by 8 Edw VII c 4 and 9 & 10 Geo V c 80

Act II of 1911 as amended by Act VII of 1930

[3] *Lallubhai Chakubhai v Chimanlal Chunilal & Co* (1935) 37 Bom L R 665

[4] *Rolls v Isaacs* (1881) 19 Ch D 268

[5] *Lalubhai Chakubhai v Chimanlal Chunilal & Co* sup

[6] *In re Hales's Patent* [1920] 2 Ch 377

Bagot Pneumatic Tyre Co v Clipper Pneumatic Tyre Co [1901] 1 Ch 196 *Penn v Jack* (1867) L R 5 Eq 81 *Sheen v Johnson* (1879) 2 All 368 *Lala Ganda Mal v Walter* (1889) P R No 115 of 1889 *Bhagat v Hari Ram* (1896) P R No 24 1896

Injunction —The Court may grant interlocutory injunction in support of a patent right[1] In issuing an injunction the Court has to see whether what is done takes from the patentee the substance of his invention—the pith and marrow[2]

2 *Copyright*

Copyright is the sole and exhaustive liberty of printing or otherwise multiplying copies of any book

This right now exists under Copyright Acts[3]

A copyright exists in books letters lectures dramatic works musical works and works of art

There is no copyright in an idea Where a person communicates an idea to an author and the author clothes the idea in the form of an article, the copyright is in the author[4]

The copyright in every book published in the lifetime of its author endures for the natural life of such author and a period of fifty years after his death with certain reservations[5]

For an intellectual work to be capable of protection as copyright it is necessary that—

1 It must be innocent that is it must not be seditious, immoral blasphemous or professing to be what it is not

2 It must be of a literary value The object of law is to protect a useful book As a general rule there is no copyright in advertisements and labels but there is in catalogues[6]

3 It must be original A very small degree of originality is sufficient to constitute a person an author[7] What is the precise amount

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1 *Dudgon* v *Thomson* (1874) 30 L T 244 *Baxter* v *Combe* (1850) 1 Ir Ch R 284 *Frearson* v *Loe* (1878) 9 Ch D 48

2 *Lallubhai Chakubhai* v *Chimanlal Chunilal & Co* (1935) 37 Bom. L R 665

3 By virtue of s 31 of the Copyright Act of 1911 (1 & 2 Geo V c 46) the common law right is abrogated.

4 *Donoghue* v *Allied Newspapers Ld* [1938] 1 Ch 106

5 Act III of 1914 embodies the Copyright Act 1911 (1 & 2 Geo V c 46) which is very comprehensive as it applies to works which may be literary dramatic musical or artistic. Section 3 of the English Statute extends the term for which copyright shall subsist to the life of the author and a period of fifty years after his death provided that at any time after the expiration of twenty five years, or in the case of a work in which copyright subsists at the passing of this Act, thirty years from the death of the author of a published work copyright in the work shall not be deemed to be infringed by the reproduction of the work for sale if the person producing the work proves that he has given the prescribed notice in writing of his intention to reproduce the work and that he has paid to the owner of the copyright royalties in respect of all copies of the work sold by him calculated at the rate of ten per cent on the price at which he publishes the work.

The mere failure of an author to make the payment prescribed by s. 5 of Act XX of 1847 does not deprive him of his copyright in his book *Venkatrao* v *Padmanabha Raju* (1927) 53 M L J 529

6 *Hotten* v *Arthur* (1863) 1 H & M 603 See *Lawrence* v *Bushnell* (1908) 35 Cal 463

7 There is a copyright in translations *Byrne* v *Statist Co* [1914] 1 K. B 622 in independent translations

of the knowledge, labour judgment or literary skill or taste which the author of any book or other compilation must bestow upon its composition in order to acquire copyright in it within the meaning of the Copy right Act of 1911 cannot be defined in precise terms In every case it must depend largely on the special facts of that case, and must in each case be very much a question of degree[1] Copyright subsists in papers set at University examinations but not in a syllabus prepared by a per son at the instance of a University for such examinations[3]

Infringement —Where a man pretending to be the author of a book illegitimately appropriates the fruits of a previous author's literary labour he commits literary larceny and is liable.[4] Infringement is interference with any rights of the owner He may be proceeded against by a civil action[5] or criminal proceedings[6]

Damages —The defendant must account for each copy of his work sold as if it had been the plaintiff s and pay the amount of profit which would have resulted from the sale of so many copies of the plaintiff s work.

3 *Trade mark and Property mark*

A trade mark is some symbol consisting in general of a picture label word or words, which is applied or attached to a trader s goods so as to distinguish them as his from similar goods of other traders and to identify them as his goods, or as those of his successors, in the business in which they are produced or put forward for sale. It is the adoption and use of a trade mark which gives a title to it As soon as a trade mark has been so employed in the market as to indicate to purchasers that the goods to which it is attached are the manufacture of a particular firm it becomes to that extent the property of the firm The actual length of the time it has been employed is not an important ingredient provided

of a non copyright work *Wyatt* v *Barnard* (1814) 3 Ves. & B 77 in compilations *Ghafur Baksh* v *Jwala Prasad* (1921) 43 All 412 in repre sentation and in performance of a work even before the Copyright Act of 1911 *Niladri Nath* v *Madan Theatres* (1934) 38 C W N 611 Reports of cases published in a journal on the pre paration of which time and trouble and legal knowledge and experience have been expended are subject of copy right *Diwan Buta Singh* v *Munshi Jagat Narain* (1893) P R. No. 15 of 1893 *Jogesh Chandra Choudhuri* v *Mohim Chandra Rai* (1914) 18 C. W N 1078 *Dicks* v *Yates* (1881) 18 Ch D 76

[1] *Macmillan* v *Cooper* (1923) 26 Bom L R. 292 P C *Moulvi Omar Ali Barlushker* v *Jnan Ranjan Mitra* (1935) 39 C W N 945 61 C L J 573 *Kartar Singh* v *Ladha Singh* (1934) 37 P L R 466.

[2] *University of London Press* v *University Tutorial Press* [1916] 2 Ch. 601

[3] *Muhammad Abdul* v *Ram Dayal* (1916) 38 All 484

[4] *Dicks* v *Yates* (1881) 18 Ch D 76

[5] The Indian Copyright Act 1914 Ch. III

[6] *Ibid* s. 13

[7] Per Lord Westbury in *Leather Cloth Co* v *The American Leather Cloth Co* (1863) 4 De G J & S. 137 142 *Richards* v *Butcher* [1891] 2 Ch. 522, *Lavergne* v *Hooper* (1884) 8 Mad. 149,

it has been used long enough to render it probable that a reputation in the market was acquired[1] The invasion of a trade mark consists not in taking the actual mark but in so taking and using it as to injure a business by representing that the goods of the plaintiff are the goods of the defendant.[2] No man is entitled to represent his goods as being the goods of another man and no man is permitted to use any mark sign or symbol device or means whereby without making a direct false representation himself to a purchaser who purchases from him, he enables such purchaser to tell a lie or to make a false representation to some body else who is the ultimate customer there is no such thing as a monopoly or a property in the nature of a copyright or in the nature of a patent in the use of any name [3] This is also known as passing off goods.

Property in a trade mark is the exclusive right to the use of the mark in respect of a particular class of goods The same mark may be used for a different class of goods without any infringement

The distinction between a trade mark and a property mark is that the former denotes the manufacture or quality of the goods to which it is attached and the latter denotes the ownership of them or more briefly the former concerns the goods themselves the latter the proprietor of them

A distinctive mark may be adopted by a person who is not the manufacturer but the importer of the goods and he will acquire the property in that mark as indicating that all goods which bear it have been imported by him.[4] Even against the manufacturer the importer can claim protection for his mark[5] But where the reputation of the brand of an article is the reputation of the manufacturers and not of the plaintiff as importer the mere fact of the plaintiff having sole right of import affords him no ground for maintaining an action against the defendant who sells the said

[1] *Somerville* v *Schembri* (1887) 12 App Cas. 453 followed in *Badische Aniline & Co* v *Tejpall* (1903) 5 Bom. L R 1025 *Lotus Limited* v *Must Nasimunessaba Begum* (1933) 38 C W N 265 *Batchayi Rowther* v *Ramaswami Pillai* (1935) 43 L W 210 *Meera Sahib* v *Abdul Azeez Sahib* (1937) 46 L. W 635 [1937] M W N 1020

[2] *Mansell* v *Valley Printing Co* [1908] 2 Ch 441 447 *West End Watch Co* v *Berna Watch Co* (1910) 13 Bom. L R 212

[3] Per James L J in *Singer Manufacturing Co* v *Loog* (1880) 18 Ch D 395 412

[4] *Lavergne* v *Hooper* (1884) 8 Mad. 149 *Ralli* v *Fleming* (1878) 3 Cal. 417 *Ebrahim* v *Essa*, (1900) 21 Mad. 163 See *Taylor* v *Virasami* (1882) 6 Mad. 108 *Heiniger* v *Droz* (1900) 3 Bom L R 1 25 Bom. 433 *Gasper & Co* v *Leong Chye & Co* (1934) 12 Ran 534 *Biddle Sawyer & Co Ltd* v *Meera Sahib & Bros* [1937] M W N 271

[5] *West End Watch Co* v *Berna Watch Co* sup Prior user of a trade mark by the manufacturer in Scotland does not bar a person in British India from acquiring a right to exclusive user *C R Cowie & Co* v *E M H Patel Bros* (1924) 2 Ran 278 The plaintiff must prove that he is the owner of the mark If the plaintiff has traded under a misrepresentation as to the existence of the company by whom the article sold by him was manufactured he is not entitled to any relief *Sen* v *Oakes* (1919) 24 C W N 155

article but not imported by the plaintiff [1]

A salesman on commission may be the proprietor of a trade mark in respect of the goods which he sells on commission [2] so may be a mere vendor of goods.[3] But a seller of goods has no exclusive right to a mark which merely denotes goods which he sells [4]

Property in a trade mark cannot be acquired until the vendible article is put upon the market for no property can be acquired except through the process of sale or offering for sale in the market [5] There can be no property in a trade-mark apart from the goods of which it has become the symbol [6]

Determination—The right of the proprietor is determined if the mark ceases to be distinctive and becomes *publici juris* for instance by general piracy [7] by being used by the proprietor for spurious goods [8] by becoming the name of the goods and so merely descriptive [9] or by abandonment [10]

Infringement—The law as to trade marks is contained in the Trade marks Act 1905[11] to 1919 [12] All marks which are trade marks can be registered under the Act A registered trade mark becomes a species of incorporeal right similar to a patent or copyright. Unregistered trade marks are protected in passing-off actions [13] In India there is no system of registration of trade marks nor is there any provision for a statutory title to a trade mark, so that the rights of parties setting up rival claims to the ownership of a trade mark must be determined in accordance with the principles of common law [14] The right to a trade mark is acquired by user [15] The use of a mark so similar as to lead or be likely to lead purchasers to buy the goods marked therewith under the impression that they are the goods of the original manufacturer whose mark they bear

[1] *Imperial Tobacco Co Ltd* v *Bonnan* (1923) 50 Cal 762 26 Bom. L R 683 P C [1924] A C 755

[2] *Major Brothers* v *Franklin & Son* [1908] 1 K B 712

[3] *Jawala Prasad* v *Munna Lall* (1909) 37 Cal 204

[4] *Vadual Sakalchand* v *Burditt & Co* (1905) 7 Bom L. R. 272

[5] *Anglo Indian Drug & Chemical Co* v *Swastik Oil Mills Co Ltd* (1934) 36 Bom L R. 1165 *Noor Mohamad Sait & Co* v *Abdul Kareem & Co* (1933) 57 Mad 600

[6] *Ibid*

[7] *Ford* v *Foster* (1872) L R. 7 Ch 611 *National Starch Co* v *Munn's etc Co* [1894] A. C 275

[8] *Wood* v *Lambert* (1886) 32 Ch D 247

[9] *Linoleum Manu Co* v *Nairn* (1878) 7 Ch D 834 *Magnolia Metal Co etc In re* [1897] 2 Ch 371

[10] *Mouson & Co* v *Boehm* (1884) 26 Ch D 398

[11] 5 Edw VII c. 15

[12] 9 & 10 Geo V c. 79

[13] 5 Edw VII c 15 s. 45

[14] *British American Tobacco Co* v *Mahboob Buksh* (1910) 38 Cal 110 117 *Hannah* v *Juggernath & Co* (1914) 42 Cal. 262 *Imperial Tobacco Co Ltd* v *Bonnan* [1924] A. C 755 (1923) 50 Cal 762 25 Bom L R. 683 P C *Nooroodeen Sahib* v *Charles Sowden* (1904) 15 M L J 45 The right in a trade-mark or trade name acquired by a person in England has no effect on the right of the parties in India in respect thereof *Wulfing* v *Jivandas & Co* (1924) 28 Bom L. R 243

[15] *Swadeshi Mills Co Ltd* v *Juggi Lal Cotton Mills Co., Ltd* (1926) All 92.

is an infringement of that mark[1] although the marks are so different that any one seeing them side by side will not be misled[2] Actual physical resemblance of the two marks is not to be the sole question for consideration[3] The question is whether there is such a resemblance as was either intended or is calculated to deceive ordinary persons so as to induce them to purchase defendant s goods under the supposition that they are the goods of the plaintiff if so no special damage need be proved[4] The test is the impression likely to be produced on the casual and unwary customer[5] There may be deception by sound as well as by sight Where the plaintiff had a lotus flower as his trade-mark on his piecegoods and the piecegoods came to be known in the market as lotus cloth the defendant who used a trade mark bearing a lotus device was restrained by injunction as his trade mark was apt to be confused by the illiterate and *unobservant with that of the plaintiff s*[6] *To constitute an infringement* it is not enough to show a mere possibility of deception There must be a reasonable probability of purchasers being deceived[7] No action or suit in respect of improper use of a trade name or a trade-mark can be maintained unless there is a false representation[8] The gist of a passing-off

[1] *Cope* v *Evans* (1874) L R 18 Eq 138 *Karm Elahi & Co* v *Abdul Aziz* (1909) P L R No 127 of 1909 P W R No 116 of 1919 *Swadeshi Mills Co Ltd* v *Juggi Lal Cotton Mills Co Ltd* (1926) 49 All 92 *O K Mohideen Bava* v *Rigaud Perfume Manufacturers* (1931) 10 Ran 133

[2] *Seixo* v *Provezende* (1866) L R. 1 Ch. 192 *Johnston* v *Orr Ewing* (1882) 7 App. Cas. 219 *Herbert Whitworth Ltd* v *Jamnadas* (1927) 30 Bom L R 514 *Anglo-Swiss Condensed Milk Co* v *Metcalf* (1886) 31 Ch D 454

[3] *Croft* v *Day* (1843) 7 Beav 84

[4] *Rodgers* v *Nowill* (1847) 5 C B 109 *Ewing* v *Grant* (1864) 2 Hyde 185 *Hugh Balfour & Co* v *Eduard Dundar Kuburn & Co* (1863) 1 Hyde 270 see *Adamjee Hajee Dawood & Co Ltd* v *The Swedish Match Co* (1928) 6 Ran 221 where the dispute was regarding the use of stars and the Court held there was no colourable imitation *O K Mohideen Bava* v *Rigaud Perfume Manufacturers* sup

[5] Per Lord Selborne in *Singer Manu Co* v *Loog* (1882) 8 App Cas. 15 18 *John Harper & Co* v *Wright & Butler & Co* [1896] 1 Ch 142 See *Badische* v *Maneckji* (1893) 17 Bom 584 *Sassoon* v *Damodar & Co* (1899) 1 Bom. L. R. 291 *Ralli* v *Fleming* (1878) 3 Cal. 417 Abdul *Salam* v *Hamid Ullah* (1913) P R No 97 of 1913 *Byramjee* v *Vera Somabhai* (1916) 8 L B R 561 *Imperial Tobacco Co Ltd* v *Atlantic Tobacco Co* (1924) 40 C L J 230 *Anglo Indian Drug & Chemical Co* v *Swastik Oil Mills Co Ltd* (1934) 36 Bom. L R. 1165 *Bundi Portland Cement Limited* v *Abdul Hussein Essaji* (1935) 38 Bom. L R 894 *Thomas Bear & Sons* v *Prayag Narain* (1934) 57 All 510 *Wood & Co* v *Kanshi Ram* (1937) 39 P L R 317

[6] *Juggi Lal* v *Swadeshi Mills Co* (1928) 31 Bom L R. 285 51 All 18 P C See *A M Malumier & Company* v *Finlay Fleming & Company* (1929) 7 Ran 169

[7] *Barlow* v *Gobindram* (1897) 24 Cal 364 *Nemi Chand* v *Wallace* (1907) 34 Cal 495 *Jawala Prasad* v *Munna Lal* (1909) 37 Cal 204 (1908) 35 Cal 311 *Mohamed Esuf* v *B M Rajaratnam Pillai* (1909) 7 M L T 55 *Abdul Salam* v *Hamid Ullan* (1912) P W R No 166 of 1912 *Madhavji etc Co* v *Central India etc Co* (1916) 18 Bom. L. R 206 *Abdul Kareem Sahib* v *Abdul Kareem Sahib* [1931] M W N 311 *Thomas Bear and Sons Ltd* v *Prayag Narain* (1934) 57 All 510

[8] *Singer Manu Co* v *Wilson* (1876) 2 Ch D 434 455 *Muhammad Ishaq* v *Alif Khan* (1902) P R. No 55 of 1902

action is deceit, for passing-off is one of the ways whereby the goods of one trader are sold by another in a manner calculated to deceive the purchaser into thinking that they are the goods of the former [1] A person however may to some extent appropriate to his own use a name suggested by his trade without infringing the law relating to trade-marks or trade descriptions.[2] If the same mark is applied to a different kind of article it is not an infringement [3] The infringement of a trade mark is a continuing wrong and so long as the infringement continues a fresh cause of action arises *de die in diem*.[4] Prosecution may be launched under the Penal Code for counterfeiting a trade mark or property mark This remedy is to be used in simple and clear cut cases where a speedy relief is required But in all complicated matters action should be instituted in a civil Court [5] For the purposes of a civil remedy the invasion is none the less though the false trade mark is used unwittingly or innocently [6] but for criminal liability the invasion must be intentional in the sense of fraudulent for a use of the same mark even knowingly but under an honest belief of a right to use it, would not be criminal

Damages —The plaintiff is entitled to claim either the damages he has sustained by reason of the infringement on the part of the defendant or the profits which the defendant has made by his wrongful act [7] Special damage by loss of custom or otherwise must be proved where a trade mark has been used and it cannot be assumed that the goods sold by the defendant would have been sold by the plaintiff but for the defendant s unlawful use of his trade mark [8] In awarding damages the Court should allow the plaintiff s usual percentage of profits on the difference between the plaintiff s usual gross trade earnings before the unfair competition began and his actual earnings thereafter with a lump sum for any expected increase of business [9] But the plaintiff is at least entitled to nominal

[1] *Anglo Indian Drug & Chemical Co* v *Swastik Oil Mills Co Ltd* (1934) 36 Bom L R 1165 *Noor Mohamed Sait & Co* v *Abdul Kareem & Co* (1933) 57 Mad 600

[2] *Emperor* v *Bakaullah Mallik* (1904) 31 Cal 411

[3] *Collins Co* v *Brown* (1857) 3 K & J 423 *Thomas Bear and Sons Ltd* v *Prayag Narain* (1934) 57 All 510

[4] *Abdul Salam* v *Hamid Ullal* (1912) P W R No 166 of 1912

[5] *Asutosh Das* v *Keshab Chandra Ghosh* (1936) 64 C L J 539

[6] *Graham & Co* v *Kerr Dodds & Co* (1869) 3 Beng L R (App) 4 Civil action may be brought though a criminal prosecution is barred under the Merchandise Marks Act (IV of 1889) *Ruppell* v *Ponnuswami* (1899) 22 Mad. 488

[7] *Sallay Mahomed Hajee Sulaiman* v *S B Neogi & Co* (1931) 10 Ran. 85 *Manockji Petit Manufacturing Co* v *The Mahalaxmi Spinning & Weaving Co* (1885) 10 Bom 617 If the plaintiff wishes to recover damages he should prove what profit he would have made if the offending article had not been put upon the market *Sallay Mahomed Hajee Sulaiman* v *S B Neogi & Co* sup *Juggi Lal* v *Swadeshi Mills Co* (1928) 51 All 182 31 Bom. L. R. 285 P C

[8] *Leather Cloth Company* v *Hirschfield* (1865) L. R. 1 Eq 299 See *Manockji &c Co* v *The Mahalaxmi etc Co* sup

[9] *Hormus Ardeshar Kandawala* v *Ardeshar Cowashji Dustoor* (1934) 61 Cal 571

damages even when he has been unable to prove any particular amo of loss

A fresh right to sue accrues in respect of each infringement[1]

Injunction —To justify an injunction the law is content with pr of acts likely to deceive.[2] It is not necessary to prove that somebo has in fact been deceived[3] A trade-mark in India is a species of p perty in respect of which an injunction may issue under the Spec Relief Act[4]

The appellant sought to restrain the respondents from selling in India well known brand of cigarettes which they imported for sale (they were ass nees of the trade-mark and goodwill for India) The respondents having boug over twenty one millions of the cigarettes cheaply from purchasers from t manufacturers were able to under ell the appellants. The appellants had n acquired any independent reputation as importers It was held that the acti was not maintainable[5]

4 *Trade name*

A trade name may be either the name of the manufacturer of goo or some name by which the manufactured goods have become generall known There is a kind of property in such a name and interferenc with it will be restrained by the Court if there is a prospect of injur to the owner of it[6] A trader is not entitled to pass off his goods as th goods of another trader by selling them under a name which is likel to deceive purchasers (whether immediate or ultimate) into the belie that they are buying the goods of that other trader although in its pri mary meaning the name is merely a true description of the goods[7] Th wrong consists in any other person selling goods of his own in such a way as to lead the public to suppose that they are purchasing some one else s goods But where a trade name is merely descriptive of th article whether originally a descriptive name or not and does not designat

[1] *Fullwood v Fullwood* (1878) 9 Ch D 176 *Aga Mahmmood v Eduard Peltzer* (1903) 2 L B R 113

[2] *Jay v Ladler* (1888) 40 Ch D 649 656 *Reddaway v Bentham Hemp Spg Co* [1892] 2 Q B 639 644

[3] *Noor Mohamed Sait & Co v Abdul Kareem & Co* (1933) 57 Mad 600

[4] Act I of 1877 *Muhammad v Alif Khan* (1902) P L R No 98 of 1902 See *Abdul Cauder v Mahomedaly* (1901) 3 Bom. L R 220 As to the form of injunction see *Johnston v Orr Ewing* (1882) 7 App Cas. 219 *Herbert Whitworth Ltd v Jamnadas* (1927) 30 Bom. L R 514

[5] *Imperial Tobacco Co of India Ltd v Bonnan* [1924] A C 755 (1923) 50 Cal 762 26 Bom L R 683

[6] *Borthwick v The Evening Post* (1888) 37 Ch D 449 See *Singer Manufac Co v Loog* (1882) 8 App Cas. 15 32

[7] *Reddaway v Banham* [1896] A C 199 *John Smidt v Reddaway* (1905) 9 C W N 281 *Parsons v Gillespie* [1898] A C 239 *Saxlehner v Apollinaris Company* [1897] 1 Ch. 893 *Unani Dawakhana v Hamdard Dawakhana* (1930) 12 Lah 224 *William Dimech v Goffredo Alessandro Chretien* (1930) 61 M L J 331 See *Badische Aniline v Farben fabriken* (1901) 6 Bom L R. 407 where Tyabji J gives a lucid summary of all leading English cases relating to trade name

manufacture by any particular firm it cannot any longer be exclusively retained by the original maker but may be adopted by any other trader [1] A name which is originally a trade name may through general use cease to indicate specifically the merchandise of any particular person and may become merely descriptive, e. g Harvey s sauce, Liebig s extract of meat [3] Madras curry powder [4]

Trading in one s own name —A man is entitled to carry on his business in his own name so long as he does not do anything more than that to cause confusion with the business of another and so long as he does it honestly [5] The Court will not restrain a man from trading in his own name except where he uses his name in such a way as to pass off his goods as the goods of another [6] After dissolution of a firm carried on in the name of one partner another partner cannot trade separately under the old name of the firm if he expose the former partner to unnecessary risk of liability [7]

Injunction —Mere similarity of name is not sufficient ground for an injunction unless damages to the plaintiff be clearly proved or the name is so closely similar as to be a colourable imitation of the plaintiff s [8] It is not necessary to prove that the defendant in taking the name complained of by the plaintiff had any fraudulent intent It is enough if the plaintiff proves that the act of the defendant in assuming the name complained of is an injury to the plaintiff's rights [9]

Name of goods —The plaintiff had for some years made belting and sold it as Camel Hair Belting a name which had come to mean in the trade the plaintiff s belting and nothing else The defendant began to sell belting made of the yarn of camel s hair and stamped it Camel Hair Belting so as to be likely to mislead purchasers into the belief that it was the plaintiff s belting endeavouring thus to pass off his goods as the plaintiff s It was held that

[1] *Native Guano Co v Sewage Manure Co* (1887) 4 R P C 473 This is a question of evidence in each case *Singer Machine Manufacturers* v *Wilson* (1877) 3 App Cas 376 379 *Vadilal Sakalchand v Burdill & Co* (1905) 7 Bom L R 272

[2] *Lazenby v White* (1871) 41 L J Ch 354*n*

[3] *Liebig s Extract of Meat Co v Hanbury* (1867) 17 L T N S 298 *Wulfing v Jivandas & Co* (1924) 28 Bom L R 243

[4] *Venkatachalam v Rajgopal Naidu* (1932) 55 Mad 966 *Hussain Meah Sahib v Abdul Rahim Sahib* [1931] M W N 254

[5] Per Romer J in *Rodgers (Joseph) & Sons v Rodgers (W N) & Co* (1924) 41 R. P C. 277

[6] *Jamieson & Co v Jamieson* (1898) 14 T L R. 160 *Mancherji* v *Framji* (1900) 2 Bom L R. 1026 *Fine Cotton Spinners & Doublers Association and John Cash & Sons Ltd v Hardwood Cash Co Ltd* [1907] 2 Ch 184 followed in *Kingston Miller & Co Ltd v Thomas Kingston & Co Ltd* [1912] 1 Ch 575 *Jays Ltd v Jacobi* (1933) 102 L J Ch 130

[7] *Moraiji v Madonji* (1903) 5 Bom. L R 545

[8] *Borthwick v The Evening Post* (1888) 37 Ch D 449 *Ewing v Buttercup Margarine Co Ltd* [1917] 2 Ch. 1

[9] *National Bank of India v National Bank of Indore* (1922) 24 Bom L. R. 1181 *Hormus Ardeshar Kandawala v Ardeshar Cowasji Dtoor* (1934) 61 Cal. 571

the plaintiff was entitled to an injunction restraining the defendant from using the words camel hair as descriptive of or in connection with belting made or sold or offered for sale by him and not manufactured by the plaintiff without clearly distinguishing such belting from the plaintiff s belting [1]

Name of firm —A blacking manufactory had long been carried on under the firm of Day and Martin The executors of the survivor continued the business under the same name A person of the name Day having obtained the authority of one Martin to use his name, set up the same trade and sold blacking as of the manufacture of Day and Martin in bottles and with labels having a general resemblance to those of the original firm He was restrained by injunction [2] Where the defendant used to run omnibuses having painted thereon words, panels or devices in colourable imitation of those on the plaintiff s omnibuses injunction was granted [3]

[1] *Reddaway* v *Banham* [1896] A C 199 *Powell* v *The Birmingham Vinegar Brewery Co* [1894] 3 Ch 449 *Grand Hotel Co of Caledonia Springs Ltd* v *Wilson* [1904] A C 103 See *Montgomery* v *Thompson* [1891] A C 217 *Venkatachalam* v *Rajgopal Naidu* (1932) 55 Mad 966

[2] *Croft* v *Day* (1843) 7 Beav 84 *Massam* v *Thorley s Cattle Food Co* (1880) 14 Ch D 748 *North Cheshire and Manchester Brewery Co* v *Manchester Brewery Co* [1899] A C 83

[3] *London General Omnibus Co* v *Felton* (1896) 12 T L R 213

TORTS TO PERSON AND PROPERTY.

CHAPTER XX

NEGLIGENCE

NEGLIGENCE is the breach of a duty caused by the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs would do or doing something which a prudent and reasonable man would not do[1] Actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill by which neglect the plaintiff has suffered injury to his person or property[2] The ideas of negligence and duty are strictly correlative, and there is no such thing as negligence in the abstract negligence is simply neglect of some care which we are bound by law to exercise towards somebody[3]

The law takes no cognisance of carelessness in the abstract It concerns itself with carelessness only where there is a duty to take care and where failure in that duty has caused damage In such circumstances carelessness assumes the legal quality of negligence and entails the consequences in law of negligence. What then are the circumstances which give rise to this duty to take care? In the daily contacts of social and business life human beings are thrown into or place themselves in an infinite variety of relations with their fellows and the law can refer only to the standards of the reasonable man in order to determine whether any particular relation gives rise to a duty to take care as between those who stand in that relation to each other The grounds of action may be as various and manifold as human errancy and the conception of legal responsibility may develop in adaptation to altering social conditions and standards The criterion of judgment must adjust and adapt itself to the changing circumstances of life The categories of negligence are never closed The cardinal principle of liability is that the party complained of should owe to the party complaining a duty to take care, and that the party complaining should be able to prove that he has suffered damage in consequence of a breach of that duty Where there is room for diversity of view it is in determining what circumstances will establish

[1] *Blyth v Birmingham Waterworks Co* (1856) 11 Ex 781 784 *Bridges v Directors etc of N L Ry* (1874) L R. 7 H L 213 232 *Bengal Nagpur Railway Company Limited v Taraprosad Maity* (1927) 48 C. L. J 45

[2] *Heaven v Pender* (1883) 11 Q B D 503 *Swan v North British Australasian Co* (1862) 7 H & N 603 *Swami Nayadu v Subramania* (1864) 2 M H C. 158

[3] Per Bowen L. J in *Thomas v Quartermaine* (1886) 18 Q B D 785 794

such a relationship between the parties as to give rise on the one side to a duty to take care, and on the other side to a right to have care taken.[1] In strict legal analysis negligence means more than heedless or careless conduct whether in omission or commission it properly connotes the complex concept of duty breach and damage thereby suffered by the person to whom the duty was owing [2]

If one man is near to another or is near to the property of another a duty lies upon him not to do that which may cause a personal injury to that other or may injure his property For instance, if a man is driving along a road it is his duty not to do that which may injure another person whom he meets on the road or to his horse or his carriage In the same way it is the duty of a man not to do that which will injure the house of another to which he is near If a man is driving on Salisbury Plain and no other person is near him, he is at liberty to drive as fast and as recklessly as he pleases But if he sees another carriage coming near to him immediately a duty arises not to drive in such a way as is likely to cause an injury to that other carriage So too if a man is driving along a street in a town a similar duty not to drive carelessly arises out of contiguity or neighbourhood [3] Negligence therefore amounts to the absence of the care which a prudent and reasonable man would take in the circumstances [4]

The standard or degree of care

The standard by which to determine whether a person has been guilty of negligence is the conduct of a prudent man in the particular situation the amount of care skill diligence or the like, varying according to the particular case. The amount of care or the like required may thus vary to the greatest extent while the standard itself—the care, skill or diligence of a careful skilful or diligent man in the particular situation—remains the same. The prudent man ordinarily with regard to undertaking an act is the man who has acquired the skill to do the act which he undertakes a man who has not acquired that special skill is imprudent in undertaking to do the act, however careful he may be and however great his skill in other things The question to be raised with regard to a man's conduct brought in question is, whether a prudent or careful or diligent man of his calling or business or skill would have undertaken to do the thing in question supposing the party to have exercised due care in executing the work undertaken

The degree of care which a man is required to use in a particular situation in order to avoid the imputation of negligence varies with the obviousness of the risk. If the danger of doing injury to the person or property

[1] Per Lord Macmillan in *Donoghue v Stevenson* [1932] A C. 562 580-83 618-19

[2] Per Lord Wright in *Lochgelly Iron and Coal Co v M'Mullan* [1934] A C. 1 25

[3] Per Esher M R. in *Le Lievre v Gould* [1893] 1 Q B 491 497

[4] *Cunard v Antifyre Ld.* [1933] 1 K. B 551 560

of another by the pursuance of a certain line of conduct is great the individual who purposes to pursue that particular course is bound to use great care in order to avoid the foreseeable harm On the other hand if the danger is slight only a slight amount of care is required The rule that a man is held to the exercise of the degree of care which an ordinarily prudent man would exercise in the same situation is subject to one or two exceptions If a person is highly skilled about a particular business and knows that to be dangerous, which another not so skilled as he does not know to be dangerous the law will hold him guilty of negligence in failing to use such expert skill If a man holds himself out as being specially competent to do things requiring professional skill he will be held liable for negligence if he fails to exhibit the care and skill of one ordinarily an expert in that business

A man who traverses a crowded thoroughfare with edged tools or bars of iron must take especial care that he does not cut or bruise others with the thing he carries Such a person would be bound to keep a better look-out than the man who merely carries an umbrella and the person who carries an umbrella would be bound to take more care in walking with it than a person who has nothing at all in his hands

If a man does work on or near another s property which involves danger to that property unless proper care is taken he is liable to the owners of the property for damage resulting to it from the failure to take proper care and is equally liable if instead of doing the work himself he procures another whether agent servant or otherwise to do it for him [1]

Good sense and policy of the law impose some limit upon the amount of care skill and nerve which are required of a person in a position of duty who has to encounter a sudden emergency In a moment of peril and difficulty the Court should not expect perfect presence of mind accurate judgment and promptitude If a man is suddenly put in an extremely difficult position and a wrong order is given by him it ought not in the circumstances to be attributed to him as a thing done with such want of nerve and skill as to amount to negligence If in a sudden emergency a man does something which he might, as he knew the circumstances reasonably think proper he is not to be held guilty of negligence because upon review of the facts it can be seen that the course he had adopted was not in fact the best [2]

Riding in cart without permission—The plaintiff a person of full age contracted with the defendant to carry certain good for her in his cart The defendant sent his servant with the cart and the plaintiff by the permission of the servant but without the defendant s authority rode in the cart with her

[1] Per Talbot J in *Brooke v Bool* [1928] 2 K B 578 587 *Honeywill and Stein Ld v Larkin Brothers Ltd* [1934] 1 K B 191

[2] *Dwarkanath v Rivers Steam Navigation Co* (1917) 20 Bom. L. R. 735 P C

goods. On the way the cart broke down and the plaintiff was thrown out and severely injured. It was held that as the defendant had not contracted to carry the plaintiff and she had ridden in the cart without his authority he was not liable for the personal injury she had sustained.[1]

Fall from tram-car.—The plaintiff in attempting to board a tram-car of the defendant company which was in motion set his foot on the foot board but failed to get a firm grip of the hand bar and before he could raise himself into the car he slipped and fell and had his toes injured by the wheels of the car. It was held that the plaintiff was not entitled to recover damages as he himself was negligent in trying to get into the car while in motion.[2]

Thrown out from motor car.—The defendant was driving a party including the plaintiff in his motor car from Deolali to Igatpuri. The road passed a level crossing. A train was timed to pass the crossing about the time. The defendant who was driving his car at an excessive speed got on the level crossing but failed to take the sharp right handed turn after the crossing. The car left the road just beyond the crossing jumped down the embankment which was ten feet high and rushed into the paddy field below. The occupants of the car with the exception of the defendant were thrown out with much violence and the plaintiff received such grave injuries as rendered him a cripple for the rest of his life. The plaintiff sued to recover damages caused to him by the defendant's negligence. It was held that the defendant was grossly and culpably negligent and that he was liable in damages.[3]

Fall from platform.—The plaintiff intending to travel went to a railway station of the defendant company. The night was very foggy and the lamps on the platform did not show through the fog. While walking along the platform the plaintiff fell on to the rails and was injured. It was held that the defendant were liable as the circumstances imposed upon them a duty to take all reasonable precautions to protect the plaintiff from the dangers besetting all movement on the platform.[4]

Injury from runaway horse.—The defendant's horse by the negligence of the defendant's servant ran away with a cart and turned from a highway into the yard of the defendant's house which opened on to the highway. The plaintiff's wife who happened to be paying a visit at the defendant's house ran out into the yard to see what was the matter when she was met and knocked down by the horse and cart receiving serious injuries. It was held that as the defendant's servant was not bound to anticipate that the plaintiff's wife would be in the yard there was no duty on the part of the defendant towards the plaintiff's wife and that the action therefore was not maintainable.[5]

Delay in repairing water pipe.—The Manchester Corporation's service water pipe in a road burst and caused a pool of water to form in the road. The water lay unheeded for three days. On the third day a frost occurred the water froze and on the ice so formed a motor car skidded and knocked down and

[1] *Lygo v Newbold* (1854) 9 Ex 302

[2] *Temulji Jamshedji v The Bombay Electric Supply & Tram Co* (1911) 13 Bom L R 345

[3] *Sorabji H Batliwala v Jamshedji M Wadia* (1913) 15 Bom L R 959; *Holloway v Holland* (1933) 10 O W N 1105

[4] *L T & S Ry v Annie Paterson* (1913) 29 T L R 413

[5] *Tolhausen v Davies* (1888) 58 L J Q B (N S) 98

killed a man The Corporation were not informed until after this accident that the service pipe had burst. In an action by the widow of the deceased under the Fatal Accidents Act 1846 against the owner of the motor car and the Corporation, it was held exonerating the owner of the motor car that the Corporation were liable in not having taken prompt steps to attend to the leak and so to prevent the road from being dangerous to traffic.[1]

Following the Roman law in the leading case of *Coggs* v *Bernard* negligence is divided into three kinds

1 Gross negligence (*lata culpa*) is the omission of that care which even inattentive and thoughtless men never fail to take of their own property

2 Ordinary negligence (*levis culpa*) is the want of that diligence which the generality of mankind use in their own concern that is, of ordinary care.

3 Slight negligence (*levissima culpa*) is the omission of that care which very vigilant and attentive persons take of their own goods or in other words of very exact diligence

The consensus of judicial opinion is however against any such classification[2] No doubt some eminent Judges and text book writers have expressed themselves in favour of such division but the cases in which it is condemned are in the majority

In the case of a pure tort there is only one standard of conduct that of ordinary diligence and only one criterion of diligence the conduct of a prudent man

But the degree of care which a person placed in a particular situation has to exercise will often vary For instance persons who are owners and occupiers of real property must not act in such a way as to cause injury to the person or property of another But persons who profess to have special skill or who have voluntarily undertaken a higher degree of duty are bound to exercise more care than an ordinary prudent man

OWNERS AND OCCUPIERS OF REAL PROPERTY

Whoever does any act whether negligently or not on or with his own property whereby damage is done to the property of another is held responsible for it Holt C J laid down the strict principle of law—*sic utere tuo ut alienum non lædas* (every one must so use his own as not to do damage to another) An improper use by one man of his land that is a user in excess of his rights may cast an additional burden on to his neighbour and thereby curtail the latter's legitimate enjoyment of his property or cause him grave personal inconvenience or even danger But

[1] *Manchester Corporation* v *Markland* [1936] A C 360

[2] See for instance *Hinton* v *Dibbin* (1842) 2 Q B 646 661 *Wilson* v *Brett* (1843) 11 M & W 113 115 *Austin* v *The Manchester Sheffield & Lincolnshire Ry Co* (1850) 10 C B 454 474 *Grill* v *General Iron Screw Colliery Co* (1866) L. R. 1 C. P 600 612 *Gublin* v *McMullen* (1868) L. R. 2 P C. 317 337

the plaintiff must show not only that he has sustained damage, but that the defendant had caused it by going beyond what is necessary in order to enable him to have the natural use of his own land If the plaintiff only shows that his own land is damaged by the defendant's using his land in the natural manner he cannot succeed[1] Where an alteration has been made in the normal state of things calculated to cause injury to a neighbour an obligation is cast upon the person who makes such an alteration to protect his neighbour from injury[2]

The leading case of *Rylands v Fletcher*[3] lays down that where the owner of land without wilfulness or negligence, uses his land in the ordinary manner of its use though mischief should thereby be occasioned to his neighbour he will not be liable in damages But if he brings upon his land anything which would not naturally come upon it and which is in itself dangerous, and may become mischievous if not kept under proper control though in so doing he may act without personal wilfulness or negligence he will be liable in damages for any mischief thereby occasioned The person whose grass or corn is eaten down by the escaping cattle of his neighbour or whose mine is flooded by the water from his neighbour's reservoir or whose cellar is invaded by the filth of his neighbour's privy or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works is damnified without any fault of his own and it seems but reasonable and just that the neighbour who has brought something on his own property which was not naturally there harmless to others so long as it is confined to his own property but which he knows to be mischievous if it gets on his neighbour's should be obliged to make good the damage which ensued if he does not succeed in confining it to his own property But for his act in bringing it there no mischief could have accrued and it seems but just that he should at his peril keep it there so that no mischief may accrue or answer for the natural and anticipated consequences[4] Thus the principle of *Rylands v Fletcher* is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes must keep it at his peril and if he does not do so is prima facie answer

[1] Per Brett L J in *West Cumberland Iron and Steel Co v Kenyon* (1879) 11 Ch D 782 787

[2] *Hawken v Shearer* (1887) 56 L. J Q B 284 *Attorney General v Cory Bros & Co* [1921] 1 A. C. 521 In *Secretary of State for India in Council v Alladin* (1928) 26 A. L. J 1151 the plaintiffs were held entitled to damages from canal authorities owing to the latter's negligence in removing silt which caused water to overflow on the plaintiff's lands *Corporation of Calcutta v Commissioners for the Port of Calcutta* (1935) 63 Cal 592 In *Khaja Kanjappa Dodda Khaji Saib v* ... [1937] 1 M L. J 197 an injunction was granted to restrain a new building being used as a mosque as it was situated in the midst of Hindu locality and there was evidence showing that it would be impossible for Hindus and Mahomedans to enjoy their legal rights peaceably

[3] (1868) L. R. 3 H L. 330

[4] Per Blackburn J in *Fletcher v Rylands* (1866) L. R. 1 Ex 265 280 4 H & C. 263 271 L. R. 3 H L. 330

able for all the damage which is the natural consequence of its escape [1] The principle of *Rylands* v *Fletcher* has been called the wild beast theory Unless there is an escape of the substance from the occupier s land there is no liability under the rule [3] The person to whom the injury is caused need not necessarily be an adjacent owner [4] It is not every use to which land is put that brings into play this principle It must be some special use bringing with it increased danger to others and must not merely be the ordinary use of the land or such a use as is proper for the general benefit of the community [5] One of the most normal uses of land is to put a building on it and if such building causes damage in future to the owner of adjoining land having an existing building on it no action lies [6]

The principle of *Rylands* v *Fletcher* applies to a proprietor who stores electricity on his land if it escapes therefrom and injures a person or the ordinary use of property It does not apply to the case of injury done to a peculiar trade apparatus unnecessarily so constructed as to be affected by minute currents of the escaping force [7] But the use of elec tric energy for lighting or other domestic purposes is so reasonable and prevalent that to bring electricity upon land or premises for such pur poses is to use the land or premises in a natural and not an unnatural way A person who keeps on his premises electric energy for domestic purposes is bound to exercise reasonable care to prevent damage therefrom accruing but he is not responsible for damage not due to his own de fault [8]

The principle of *Rylands* v *Fletcher* was held to apply where a com pany stored in close proximity nitrate of soda and dinitrophenol for the purpose of making munitions for Government with the result that on a fire breaking out they exploded with terrific violence causing loss of life and serious damage to adjoining property [9] Similarly where the defend ants drove a very large number of piles into the soil thereby setting up such a heavy vibration as to cause serious structural damage to an old house belonging to the plaintiffs with the result that the greater part had to be taken down in compliance with a dangerous structure notice it was

1 Per Blackburn J in *Fletcher* v *Rylands* (1866) L R 1 Ex 265 279 280

2 Russell C J in *Price* v *South Metropolitan Gas Co* (1895) 65 L J Q B 126

3 *Howard* v *Furness etc Limes Ltd* (1936) 2 All E R 781

4 *West* v *Bristol Tramways Co* (1908) 2 K B 14 *Charing Cross Electricity Supply Co* v *Hydraulic Power Co* (1914) 3 K B 772

5 *Rickards* v *Lothian* (1913) A C 263 280 *Eastern & South African Telegraph Co* v *Cape Town Tram Co* (1902) A C 381 393 *Western Engraving Co* v *Film Laboratories Ltd* (1936) 1 All E R 106 *Collingwood* v *Home & Colonial Stores* (1936) 1 All E R 74

6 *Wilkins* v *Leighton* (1932) 2 Ch 106

7 *Eastern and South African Telegraph Co* v *Cape Town Tramways Co* sup *National Telephone Co* v *Baker* (1893) 2 Ch 186

8 *Dhanal Soorma* v *Rangoon Indian Telegraph Association Ltd* (1935) 13 Ran. 369

9 *Rainham Chemical Works Ltd* v *Belvedere Fish Guano Co* (1921) 2 A. C 465

held that the defendants were responsible as insurers for all damage caused by the escape of the vibration they had so created[1]

Under the principle of *Rylands* v *Fletcher* a person who brings dangerous substances upon premises and carries on a dangerous trade with them is liable if though without negligence on his part these substances cause injury to persons or property in their neighbourhood It is immaterial whether he is or is not aware of the danger at the time when he brings and uses them Thus a tramway company was held liable for using wood blocks coated with creosote which gave off fumes which injured plants and shrubs of the plaintiff whose premises were near the road[3] This liability exists whether the land is or is not owned by the person responsible for the bringing upon it and u e of the dangerous substances The principle of *Rylands* v *Fletcher* applies to cases in which the site of the plaintiff s injury was occupied by him only under a license and not under any right of property in the soil[4]

If a man brings on to his premises a dangerous thing which is liable to cause fire such as a motor car with petrol in it the carburettor of which is not unlikely to get on fire when the engine is started and a fire results though without any negligence on his part he is liable for the rule is that he must keep such a thing under control at his peril[5] If a person uses a traction engine which emits sparks in spite of all precautions being taken to prevent their emission he will be liable if another person s hayrick be set on fire by the sparks, upon the ground that such an engine is a dangerous machine[6]

A person making an operation for collecting and damming up the water of a stream must so work as to make proprietors or occupants on a lower level as secure against injury as they would have been had nature not been interfered with It is the duty of any one who interferes with the course of a stream to see that the works which he substitutes for the channel provided by nature are adequate to carry off the water brought down even by extraordinary rainfall and if damage results from the deficiency of the substitute which he has provided for the natural channel he will be liable.[7]

The principle of *Rylands* v *Fletcher* is followed in various Indian cases.[8]

[1] *Hoare and Co* v *McAlpine* [1923] 1 Ch. 167

[2] *Belvedere Fish Guano Co* v *Rainham Chemical Works* [1920] 2 K B 487 *Hale* v *Jennings Brothers* [1938] 1 All E R. 579

[3] *West* v *Bristol Tramways Co* [1908] 2 K B 14

[4] *Charing Cross West End Electric Co* v *London Hydraulic Power Co* [1913] 3 K B 442 *Rainham Chemical Works Ltd* v *Belvedere Fish Guano Co* [1921] 2 A C 465

[5] *Musgrove* v *Pandelis* [1919] 1 K B 314

[6] *Powell* v *Fall* (1880) 5 Q B D 597

[7] *Greenock Corporation* v *Caledonian Railway Co* [1917] A C 556 579

[8] The plaintiff sued for damage caused to his land by the bursting of a *bund* erected by the defendant it was held that as the *bund* had been made

Water —The defendant had constructed a reservoir on his land Under neath the reservoir so constructed were certain disused mining shafts which com municated with mines under the adjoining land of which the plaintiffs were lessees. The defendant was not personally guilty of any negligence and employed competent persons to construct the reservoir but it was not made sufficiently strong having regard to the existence of the disused shafts to bear the pressure of water which burst through the shafts and flooded the plaintiffs mine. It was held that the plaintiffs were entitled to damages in respect of the damage caused thereby to their mine[1] The defendant in erecting a house put pipes down to convey water from the roof but did not connect them with any drain The water came through the pipes into the cellar of the house collected there into a pool and

in a lawful manner and the breach was owing to no fault of the defendant the defendant was not liable *Gooroo Churn* v *Ram Dutt* (1865) 2 W R. 43 *Kadur Buksh* v *Ran Nag* (1867) 7 W R. 448 A suit for damages was held to lie against a proprietor who penned back the water of a stream by erecting a *bund* upon his land so as to inundate the land of his neighbour without his license and con sent *Becharam Choudhry* v *Puhub rath Jha* (1869) 2 Beng L R. App 53 The defendant closed up the outlet of a bank upon his own land whereby the surface drainage water had im memorially flowed from the plaintiff s land into and over the defendant s land and so escaped By reason of the closing of those outlets the water was un able to escape and the plaintiff s land became flooded and the crops therein damaged. It was held that the defend ant was liable for the damage caused *Mussamut Anundmoyee Dossee* v *Mus samut Hameedoonissa* (1862) Marsh 85 sub nom. *Must Hameedoonissa* v *Musst Anundmoyee Dossee* (1862) 1 Hay 152

The Bombay High Court has held that before a person can be made liable in damage for injury caused to his neighbour s land by water either flowing from the former s land to the latter s or percolating from the one into the other it must be shown that the water was brought or collected on his land by him voluntarily for his own purposes in a non natural use of it. Otherwise he is not liable *Moholal Maganlal* v *Bai Jitkore* (1904) 6 Bom L R. 529 28 Bom. 472 This case has been doubted and distinguished in *Ramanuja Chariar* v *Krishnaswami Mudali* (1907) 31 Mad 169 which decided that the retention of water by a person on a portion of his land to prevent its passing on to other portions of his land was not an act done in the natural and usual course of enjoyment and the person so doing was liable for damage caused thereby

A suit for damages based on an allegation that defendant had neglected to drain his garden so as to prevent water from collecting there and injuring the adjoining property of the plaintiff is not maintainable as the owner of property is under no legal obligation to incur expenses upon it for the benefit of his neighbours where it has not been altered in character by his acts or with his permission in such a way as to expose them to any injury *Baldeo Das* v *Secretary of State* (1883) P R. No 30 of 1883

Where the defendants with a view to make their land cultivable lowered its level with the consequence that water in a tank belonging to a third party passed to that land and subsequently overflowed into lands b longing to the plaintiff it was held that the plaintiff was not entitled to any cause of action *Kenaram Akhuli* v *Sristi dhar Chatterjee* (1912) 16 C W N 875

Where Government constructs an irrigation canal it undertakes a duty to protect other parties against damage arising from the water of the canal and if it does not take adequate precautions to deal with the overflow of water from the canal for instance, by means of an outlet at the tail end of the canal it is liable to compensate those to whom damage may be caused by such overflow *Secretary of State for India* v *Ramtahal Ram* (1925) 6 P L T 708

[1] *Rylands* v *Fletcher* (1868) L R. 3 H L. 330

flowed from thence into the cellar of the adjoining house of the plaintiff which was on a lower level it was held that the plaintiff was entitled to damages in respect of the injuries caused thereby [1]

By reason of an unprecedented rainfall a quantity of water was accumulated against one of the sides of the defendants railway embankment, to such an extent as to endanger the embankment when in order to protect their embankment the defendants cut trenches in it by which the water flowed through and went ultimately on to the land of the plaintiff which was on the opposite side of the embankment and at a lower level and flooded and injured it to a greater extent than it would have done had the trenches not been cut. In an action for damages for such injury the jury found that the cutting of the trenches was reasonably necessary for the protection of the defendant s property and that it was not done negligently It was held that though the defendants had not brought the water on their land they had no right to protect their property by transferring the mischief from their own land to that of the plaintiff and that they were therefore liable [2]

The plaintiffs were the owners of electric cables which had been laid under certain public streets defendants were the owners of hydraulic mains which had been laid under the same streets These mains burst in four different places in each case damaging the plaintiffs cables. The bursting of the mains was not due to any negligence on the part of the defendants It was held that the defendants were liable although the site of the plaintiffs injury was occupied by them only under a licence and not under any right of property in the soil [3]

A municipal authority in laying out a park constructed a concrete paddling pond for children in the bed of a stream and altered the course of the stream and obstructed the natural flow of water therefrom Owing to a rainfall of extraordinary violence the stream overflowed at the pond and as the result of the operations of the authority a great volume of water which would have been carried off by the stream in its natural course without mischief poured down a public street into the town and damaged the property of two railway companies It was held that the extraordinary rainfall was not an act of God which absolved the authority from responsibility and that they were liable in damages to the railway companies.[4] Lord Wrenbury observed Assuming an act of God such as flood wholly unprecedented the damage in such a case results not from the act of God but from the act of man in that he failed to provide (as there was before) a channel sufficient to meet the contingency of the act of God But for the act of man there would have been no damage from the act of God To construct a reservoir on your land is a lawful act. To close or divert the natural line of flow so as to render it less efficient is not [5]

Injury caused by beehives —Plaintiff and defendant resided on adjacent farms The defendant kept a number of beehives. The bees swarming from these hives

[1] *Snow* v *Whitehead* (1884) 27 Ch D 588 dissenting from *Ballard* v *Tomlinson* (1884) 26 Ch D 194

[2] *Whalley* v *The Lancashire and Yorkshire Ry Co* (1884) 13 Q B D 131 *Greyvensteyn* v *Hattingh* [1911] A C 355 *Swami Ullah* v *Mukund Lal* (1921) 43 All 688

[3] *Charing Cross Elec Sup Co* v *Hydraulic Power Co* [1914] 3 K B 772

[4] *Greenock Corporation* v *Caledonian Railway* [1917] A C 556

[5] *Ibid* p 584

frequently caused annoyance to the inhabitants of the neighbouring farm One day the defendant for removing honey smoked the hives with a smoker without warning the plaintiff who was tackling his horse The bees irritated by the smoking operation swarmed upon the plaintiff and his horse The horse dragged the plaintiff and threw him violently against a wall causing him severe injuries It was held that the defendant was liable [1]

Damage caused by rats to adjoining owner—The defendants carried on the business of bone manure manufacturer on premises near the plaintiff s farm. For the purpose of their business they had on their premises a heap of bones which caused large numbers of rats to assemble there The rats made their way from the defendants premises on to the plaintiff s land and ate his corn causing substantial loss in respect of which the plaintiff claimed damages from the defendants. It was held that no cause of action was established against the defendants.

Eating of yew tree leaves by horse—The defendants planted on their own land, but so close to the boundary as to project into th adjoining meadow in the occupation of the plaintiff a yew tree and the plaintiff s horse whilst feeding in the meadow ate off the portion of the tree which projected and died in consequence it was held that the defendants were liable for the value of the horse [3] But if the poisonous leaves had not extended to his neighbour's boundary he would not have been liable for his legal duty to his neighbour stopped with his boundary within which he was free to do or grow whatever he wished so long as the boundary was not overpassed. Thus, where the plaintiff s horse ate of the branche of a yew tree no part of which extended over his field and the defendants were under no liability to fence against the plaintiffs it was held that they were not liable since they owed no duty or care in respect of trespassing animals [4]

Swallowing of pieces of iron rope by cow—The defendant s land adjoining the plaintiff s was fenced by a wire rope repaired by them Through exposure the rope decayed and pieces of it fell on the grass on the plaintiff s land whose cow in grazing swallowed one of the pieces, and died in consequence The defendant was held liable to the plaintiff for the loss of the cow [5]

Allowing thistles to grow—Where an occupier of land allowed thistles, which he had not brought on to his land but which were its natural produce to seed so that the seed was carried on to the adjoining land which was thereby injured it was held that no action lay for the damage caused thereby [6]

Allowing nuisance to be created—The defendants, in return for payment allowed persons to place caravans on a disused brickfield and to live in them and some of these persons committed in the vicinity but not in the brickfield acts which interfered with the comfort of people in the neighbourhood. In an action restraining the defendant from permitting the brickfield to be occupied in

[1] *O Gorman* v *O Gorman* [1903] 2 I R 573

[2] *Stearn* v *Prentice Brothers Limited* [1919] 1 K B 394

[3] *Crowhurst* v *Amersham Burial Board* (1878) 4 Ex D 5

[4] *Ponting* v *Noakes* [1894] 2 Q B 281

[5] *Firth* v *Bowling Iron Co* (1878) 3 C P D 254

[6] *Giles* v *Walker* (1890) 24 Q B D 656

such a way as to be a nuisance it was held that as the defendant was putting his land to an abnormal use he was responsible for the nuisance which existed in the vicinity [1]

Falling of rocks owing to natural causes—The owner of land on which there was an outcrop of rock overhanging a steep slope was held not liable for damage caused by reason of portions of that rock breaking away and falling down the slope as the break was due to natural causes such as weathering and the owner had used his land in an ordinary way without any mining or quarrying operations.[2]

Falling of piece of gutter due to non repair—The defendants were the lessees and occupiers of a building which they were liable to keep in repair The plaintiff husband and wife occupied a flat on the third floor of the building Owing to the defendants neglect to repair a heavy piece of guttering fell from the main roof of the building through the glass roof of the plaintiffs kitchen causing injury by broken glass to the wife. It was held that the defendant were under a duty to take reasonable care that the guttering should not fall and were therefore liable [3]

Fire caused by fault in electric lighting circuit—In premises adjoining those of the plaintiff a fire originated owing to some unknown defect in the electrical wiring The plaintiff s premises were damaged by the water used for extinguishing the fire It was held that in the absence of any proof of negligence by the defendants in the installation or the maintenance of the electric wiring they were not liable to the plaintiff under the doctrine of *Rylands v Fletcher* [4]

Exceptions—A person is not liable if damage is done owing to the following causes —

1 Act of God (*vis major*) which is defined to be such a direct violent sudden and irresistible act of nature as could not by any amount of ability have been foreseen or if foreseen could not by any amount of human care and skill have been resisted [5] Thus those acts which are occasioned by the elementary forces of nature unconnected with the agency of man or other cause will come under the category of acts of God [6] e g storm tempest [7] lightning, extraordinary fall of rain [8] extraordinary high tide [9] extraordinary severe frost [10] In order that a phenomenon should fall within the operation of the rule of law with regard to the act of God it is not necessary that it should be unique, that it should happen for the

1 *Attorney General v Corke* [1933] 1 Ch 89

2 *Pontardawe Rural Council v Moore gwyn* [1929] 1 Ch 656

3 *Cunard v Antifyre Ld* [1933] 1 K B 551

4 *Collingwood v Home & Colonial Stores* [1936] 1 All E R 74

5 *Nugent v Smith* (1876) 1 C P D 423 433 *Vithaldas Dharamdas v Municipal Commissioner of Bombay* (1902) 4 Bom L R. 914 *Municipality of Hubli v Ralli Brothers* (1911) 13 Bom. L R 1136 *Lallu v Fazl Haq* (1918) 1 U P L R 15

6 *Forward v Pittard* (1785) 1 T R 27

7 *Nugent v Smith* sup

8 *Nichols v Marsland* (1875) L. R. 10 Ex 255 *Ram Lall Singh v Lill Dhary* (1877) 3 Cal 776

9 *Nitrophosphate Manure Co v L & St Katherine Docks* (1878) 9 Ch D 503

10 *Blyth v Birmingham Water works Co* (1856) 11 Ex. 781

first time it is enough that it is extraordinary and such as could not reasonably be anticipated [1]

Vis major to afford a defence must be the proximate cause the *causa causans* and not merely a *causa sine qua non* of the damage complained of The mere fact that *vis major* co-existed or followed on the negligence is no adequate defence Before an act of God may be admitted as an excuse the defendant must himself have done all that he is bound to do [2]

Leading cases—RYLANDS *v* FLETCHER NICHOLS *v* MARSLAND

The defendant had a series of artificial lakes on his land in the construction or maintenance of which there had been no negligence Owing to a most unusual fall of rain so great that it could not have been reasonably anticipated some of the reservoirs burst and carried away four country bridges. It was held that the defendant was not liable inasmuch as the water escaped by the act of God [3] A water company whose apparatus was constructed with reasonable care and to withstand ordinary frosts, was held not liable for the bursting of the pipe by an extraordinary severe frost.[4]

2 Wrongful act of a third party [5] A landlord using his premises in an ordinary and proper manner is bound to exercise all reasonable care but he is not responsible for damage not due to his own default whether that damage be caused by inevitable accident or wrongful acts of third persons [6]

Though the act of a third party may be relied on by way of defence the defendant may still be held liable in negligence if he failed in foreseeing and guarding against the consequences to his works of that third party s act [7]

Where the reservoir of the defendant was caused to overflow by a third party sending a great quantity of water down the drain which supplied it and damage was done to the plaintiff it was held that the defendant was not liable [8]

Plaintiffs hotel was destroyed by fire caused by the escape and ignition of natural gas which percolated through the soil and penetrated into the hotel basement from a fractured welded joint in a main under the street belonging to the defendants. The cause of the break in the welded joint through which the gas leaked was due to operations caused by the local authority in constructing a

[1] *Nitrophosphate Manure Co v London and St K D Co* (1878) 9 Ch D 503 515

[2] *Municipal Corporation of Bombay v Vasudeo Ramachandra* (1904) 6 Bom L R 899 In this case the damage caused was due to the insufficiency of precautions taken by the defendant in constructing bridges and embankments in a creek for carrying a duct line to cope with conditions which might reasonably have been anticipated, and it was held that the defendant was liable See *Seetharama Swami v Secretary of State for India in Council* [1925] M W N 352 21 L W 449

[3] *Nichols v Marsland* (1875) L. R. 10 Ex 255 See *Ram Lall v Lall Dhary* (1877) 3 Cal 776 *Gooroo Churn v Ram Dutt* (1865) 2 W R. 43

[4] *Blyth v Birmingham Water works Co* (1856) 11 Ex 781

[5] *Box v Jubb* (1879) 4 Ex. D 76

[6] *Rickards v Lothian* [1913] A. C. 263

[7] *Northwestern Utilities Ltd v London Guarantee and Accident Co* [1936] A C. 108 125

[8] *Box v Jubb* sup

storm sewer beneath the main It was held that as the defendants were carrying gas at high pressure which was very dangerous if it should escape they owed a duty to the owners of the hotel to exercise reasonable care and skill that the owners should not be damaged that the local authority might at any time be conducting operations in connection with their sewers in the vicinity of the plaintiffs mains and it was the duty of the defendants to watch such operations and that a failure by the defendants to know of them was not consistent with due care on their part in the interests of members of the public likely to be affected [1]

3 Plaintiff s own default

The plaintiff and defendant occupied adjoining farms which they rented from the same landlord A fence upon the plaintiff s farm which under his agreement of tenancy he was liable as between himself and the landlord to keep and leave in good repair and which divided the farms became out of repair with the result that two of the defendant s horses escaped from a field forming part of the farm occupied by him into a field forming part of the farm occupied by the plaintiff and injured a colt belonging to him The defendant had entered into an agreement with the landlord, in terms similar to that of the plaintiff to keep in repair the fences on his holding It was held that the defendant was liable to the plaintiff in damages for the injuries caused to the plaintiff s colt inasmuch as the general principle that owners of animals must keep them upon their land at their peril applied and the mere fact that the plaintiff had committed a breach of the obligation he was under as between himself and the landlord to repair the fence was not enough to bring the case within the exception of damage caused by the plaintiff s own default [2]

4 Artificial work maintained for the common benefit of plaintiff and defendant [3]

Gnawing of rain water box —The defendant was the plaintiff s landlord and was living on the floor above him Some rats gnawed a rain water box maintained by the defendant for the benefit both of himself and the plaintiff and the water running through injured plaintiff s goods below it was held that no action lay [4]

Leakage of cistern —The defendant was the owner of premises to which water was laid on and he had a cistern on the fourth floor The plaintiff became tenant of the ground floor and took his supply of water from the defendant. A leakage from the cistern having been noticed by the plaintiff he informed the defendant who instructed a competent plumber to remedy it In consequence of the negligence of the plumber an overflow occurred which damaged the plaintiff s goods. It was held that the defendant was not liable since the plaintiff had assented to the water being on the premises, and therefore the defendant by instructing a competent plumber to remedy the leakage had discharged his duty to the plaintiff [5]

[1] *Northwestern Utilities Ld* v *London Guarantee and Accident Co* [1936] A C 108

[2] *Holgate* v *Bleazard* [1917] 1 K. B 443

[3] *Carstrairs* v *Taylor* (1871) L R 6 Ex 217 *Bomanji Mancherjee* v *Mahomedali Haji Ismail* (1905) 7 Bom. L R. 713

[4] *Ibid*

[5] *Blake* v *Woolf* [1898] 2 Q B 426 *Anderson* v *Oppenheimer* (1880) 5 Q B D 602 *Ross* v *Fedden* (1872) L R. 7 Q B 661

5 When it is the consequence of an act done for public purposes in the discharge of a public duty under the express authority of a statute [1] No action will lie for doing that which the legislature has authorized if it be done without negligence although it does occasion damage to anyone but an action does lie for doing that which the legislature has authorized if it be done negligently And if by a reasonable exercise of the powers the damage could be prevented it is within this rule negligence not to make such reasonable exercise of their powers The statute must authorise the use of the dangerous thing either expressly or by necessary implication

The care of a prudent man required from owners and occupiers of lands and buildings differs according as the persons in regard to whom it has to be exercised These persons fall into the following categories —

1 Persons entering into property without permission (e g trespassers)

2 Persons coming by permission solely of their own choice and on their own business (e g licensees volunteers and guests)

3 Persons induced to come on business and interests of the occupants alone or of themselves and the occupants (e g invitees customers)

4 Persons lawfully passing by

The care or duty varies being lowest to a trespasser more care is owed to a licensee, and still more to an invitee

1 A trespasser is a person who enters into another s property without any right or permission In such cases the general rule is that there is no duty of care towards such person He who enters wrongfully does so at his own risk in all respects The occupier has no duty to take reasonable care for his protection or even to protect him from concealed danger An occupier is liable only where the injury is due to some act done with the deliberate intention of doing harm to the trespasser or at least some act done with reckless disregard of the presence of the trespasser [3] For instance, he must not set up a spring gun in his garden unless he can justify his action as being a merely reasonable measure of self defence He must not do anything to punish intruders in a cruel manner altogether disproportioned to the injury done by the trespass [4] A trespasser on a railway train has no right of action for damages for personal injuries caused by a collision resulting from the negligence of the servants of the railway company [5]

Leaving unfenced excavated area — A a builder left an excavated area

[1] *Madras Railway Co* v *Zemindar of Carvatenagarum* (1874) 1 I A 364

Per Lord Blackburn in *Geddis* v *Proprietors of Bann Reservoir* (1878) 3 App Cas. 430 455

[3] *Robert Addie & Sons* v *Dumbreck* [1929] A C 358 365

[4] *Bird* v *Holbrook* (1828) 4 Bing 628

[5] *Grand Trunk Railway of C* v *Barnett* [1911] A. C. 361 369

open and unfenced against the road on which it abutted B lawfully walking at night along the thoroughfare passing close by the premises fell into the area A was held to have failed to exercise the care of a prudent man [1]

Injury to trespasser—Where the servant of an electric installation company meddled with a live wire of another company which supplied electric energy and died of electric shock it was held that the latter company was not liable for it owed no duty to the deceased [2] A railway company was held not liable to a trespasser for a mere error of judgment even amounting to negligence on the part of its servant which caused injury to the trespasser [3]

2 A licensee is a person who enters on premises under a license from the occupier either express or implied A bare licensee is only entitled to use the place as he finds it [4] The occupier is under an obligation to caution him against any known insecurity or hidden or concealed danger of which he was aware [5] If the danger is obvious the licensee must look out for himself if it is one to be expected he must expect it and take his own precautions [6] The owner must not create new traps without taking precautions to protect the licensee against them.[7] A trap is something which involves the idea of concealment and surprise, of an appearance of safety under circumstances cloaking a reality of danger [8] For instance a person who knows that the public are going over his ground is not entitled without warning or notice to put a dangerous beast which is likely to do some injury to persons crossing the grounds [9] The grant of the licence to go on the land creates no right but merely affords an answer to a charge of trespass [10] Any complaint by the licensee may be said to wear the colour of ingratitude so long as there is no design to injure him [11]

1 *Barnes* v *Ward* (1850) 9 C B 392 *Hurst* v *Taylor* (1885) 14 Q B D 918 See *Coffe* v *McEvoy* [1912] 2 I R 95

2 *De Mello* v *Meridian Electrical Co* (1926) 29 Bom L R. 402

3 *Ismail* v *B B & C I Railway* (1932) 34 Bom L R. 826

4 *Hounsell* v *Smith* (1860) 7 C B N S 731 *Batchelor* v *Fortescue* (1883) 11 Q B D 474 *Hayward* v *Drury Lane Theatre* [1917] 2 K B 899 913

5 *Fairman* v *Perpetual Investment Building Society* [1923] A C 74 *Gautret* v *Egerton* (1867) L R 2 C P 371 *Latham* v *Johnson* [1913] 1 K B 398 411 *Robert Addie & Sons Collieries Ltd* v *Dumbreck* [1929] A C 358 364 The view of Lord Hailsham in *Addie's* case (p 364) that the duty of warning extends not only to concealed dangers actually known to the occupier but also to concealed dangers which he *ought to have known* is regarded as a slip by the Court of Appeal in *Ellis* v *Fulham Borough Council* [1938] 1 K B 212 and *Coates* v *Rawtenstall Borough Council* [1937] 3 All E R 602 Similarly the views of Lords Wrenbury and Atkinson in *Fairman's* case (pp 86 and 96) on the same point are to be considered as slips

6 *Mersey Docks and Harbour Board* v *Proctor* [1923] A C 253 274 *Coleshill* v *Manchester Corporation* [1928] 1 K B 776 *Robert Addie & Sons* v *Dumbreck* [1929] A C 358 See *Excelsior Wire Rope Co* v *Callan* [1930] A C 404

7 *Hayward* v *Drury Lane Theatre and Moss Empires* [1917] 2 K B 899 913

8 Per Hamilton L J in *Latham* v *Johnson* [1913] 1 K B 398 415 416

9 *Lowery* v *Walker* [1911] A C 10 14

10 *Bolch* v *Smith* (1862) 7 H & N 736 745

11 Per Willes J in *Indermaur* v *Dames* (1866) L R. 1 C P 274 285

Otherwise a man who allows strangers to roam over his property would be held answerable for not protecting them against any danger which they might encounter whilst using the license.[1] Thus the owner of cliffs by the sea who allows the public to walk there is not bound to fence them off nor is the owner of downs who allows people to walk and ride thereon liable for unfenced quarries or banks honeycombed by rabbits however dangerous they may be.[2]

If a person creates a dangerous condition of things (something in the nature of a concealed trap) on the premises of another and he sees some other person who to his knowledge is unaware of the existence of the danger lawfully exposing himself or about to expose himself to the danger which he has created he is under a duty to give such person a warning [3]

The position of a licensee is better than that of a trespasser in that he is entitled not to have the condition of the premises so altered as to set up a trap for him.

A guest at a house is a licensee [4] Similarly persons who enter premises to solicit orders or to beg or to hold any communication with the occupier are licensees.

Uncovered hole—A gave permission to B to cross his yard which was traversed by several routes. In a part of the yard was a hole which A usually kept covered. One night A uncovered it, and B who was unprepared for its being uncovered took the same route as usual and sustained damage from falling into the hole A was held liable [5]

Two workmen of a gas company were altering the gas fittings in an unoccupied house which had been let to a tenant who was converting it into two flats one of which he proposed to let. In doing this the workmen had taken up a board on a dark landing A lady to whom the tenant had given an order to view the top flat knocked at the door One of the workmen opened it she showed her order to view and passed in up the stairs The workmen did not tell her of the hole where the board was up She passed it once but fell into it on her return and damaged her knee She sued the gas company It was held that the company s workmen were under a duty to warn her of the existence of the hole that this duty arose independently of the occupation of the premises or of any invitation or licence and that the company was liable.[6]

Putting materials on road without warning—There was a private way across A s premises which B used with A s consent. C had also been permitted to deposit slate and other materials on the same road at night. B s horse driven along the road at night was injured by falling over the materials. A was held answerable to B Had B been a trespasser there would have been contributory negligence on his part, but he was lawfully on the road and without negligence

[1] *Gautret* v *Egerton* (1867) L R 2 C P 371

Per Farwell L J in *Latham* v *Johnson Ltd* [1913] 1 K B 398 405

[3] *Kimber* v *Gas Light and Coke Co* [1918] 1 K B 439 445

[4] *Southcole* v *Stanley* (1856) 1 H & N 247

[5] *Blyth* v *Topham* (1607) Cro. Jac 158 *Gautret* v *Egerton* sup

[6] *Kimber* v *Gas Light and Coke Co* sup

and A was bound to take the care of a prudent man that he did not meet with harm by warning him of what was a hidden danger in the nature of a trap[1]

Falling of pane of glass —A was defendant s guest When he was leaving the house a loose pane of glass fell from the door as he was pushing it open and cut him It was known that the glass was in a dangerous state. It was held that there was no want of due care on the part of the defendant

Injury to police officer entering at night through door —A police constable seeing the door of the defendant s warehouse open after dark and in order to see that everything was right and in the execution of his duty entered the warehouse and injured himself by falling into an unfenced sawpit inside It was held that he had no legal right to enter being neither a licensee nor an invitee but that even assuming he had the defendant was under no duty to him to make the place safe for him or to warn him of the danger[3]

Fall from stair case —The defendants owned a block of flats which they let to various tenants the defendants keeping possession and control of the common stair case giving access to the flats. The stairs were made of cement reinforced by iron bars embedded in the cement and running along the whole length of the tread Owing to the wearing away of the cement in some cases irregular depressions were scooped out behind the iron bars. The plaintiff who lodged with her sister in a flat of which the sister s husband was the tenant whilst descending the stairs caught her heel in a depression so formed and fell and was injured. In an action for damages against the defendants it was held that the defendants were not liable as the only duty owed by the defendants to the plaintiff was not to expose her to a concealed danger or trap but the depression which caused the plaintiff to fall was obvious and could have been seen by her if she had looked[4]

Injury caused by a piece of glass in a pool —The defendant Council main tained a paddling pool in a public park for children Loads of sand were put at the side of the pool to give the appearance of the sea side Some of the sand had silted or been pushed under the water A boy of a rate payer while paddling stepped upon a piece of glass hidden in the sand and cut his toe The pool was raked every morning and the accident happened almost immediately after the pool had been raked out by an official of the defendants. It was held that the boy was in the position of a licensee and the defendants were liable as they knew that there was a possible danger to children paddling in the pool through articles in the pool and took measures to remove such articles but that such measures were inadequate[5]

Injury to children on recreation ground —The defendants maintained a chil drens recreation ground upon which there was a chute or childrens slide The plaintiff aged three years and a boy aged fourteen while sliding on the chute collided with a chain which had improperly been fixed across the chute by another child the plaintiff receiving serious injuries. The chain was used to prevent the use of the chute on Sundays and was kept padlocked to a pole The recreation ground attendant had negligently failed to secure the chain to

[1] *Corby v Hill* (1858) 4 C B N S 556 See *Evans v The Trustees of the Port of Bombay* (1886) 11 Bom 329

Southcote v Stanley (1856) 1 H & N 247

[3] *Great Central Ry Co v Bates* [1921] 3 K B 578

[4] *Fairman v Perpetual Investment Building Society* [1923] A. C 74

[5] *Ellis v Fulham Borough Council* [1938] 1 K B 212

the pole whereby a child had been able to remove it and fix it to the bottom of the chute The defendants contended that the recreation ground was provided for children of school age only and that the plaintiff was a trespasser It was held that the plaintiff was accompanied by the elder boy as guardian and was, therefore a licensee that the injuries were caused by a danger which was known to the attendant and that the defendants were therefore liable [1]

3 An invitee is a person who is on the premises for some purpose in which he and the occupier have a common interest An intending customer entering a shop is an invitee There is a distinction between an invitee and a licensee The invitor and invitee have a common interest but the licensor and licensee have none The owner of premises incurs liability to the former as to existing traps but not to the latter Thus there is a clear distinction in the duty owed towards a person permitted and a person invited Permission involves leave and licence but it gives no right Those who are invited as guests whether from benevolence or for social reasons are not in law invitees but licensees The law does not take account of the worldly advantage which the host may remotely have in view

The inducement to come on the premises may be either by express or implied invitation. The expression persons coming by inducement includes customers persons calling for orders persons doing work about the structure and others but does not include guests

Invitees may be divided into two classes (*a*) those who do not pay for their presence on the premises and (*b*) those who use the premises on payment

(*a*) The person invited using reasonable care on his part for his own safety is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger which he knows or ought to know [3] If the danger is not such that he ought to know of it his liability does not extend to it [4] The duty is limited to those places to which the invitee might reasonably be expected to go in the belief reasonably entertained that he was entitled or invited to do so [5] This duty to an invitee only extends so long as and so far as the invitee is making what can reasonably be contemplated as an ordinary and reasonable use of the premises by the invitee for the purposes for which he has been invited He is not invited to use any part of the premises for purposes which he knows are wrongfully dangerous and constitute an improper use

[1] *Coates* v *Rautenstall Borough Council* [1937] 3 All E R 602

Latham v *Johnson* [1913] 1 K B 398 410

[3] *Indermaur* v *Dames* (1866) L. R. 1 C. P 274 288 *Chapman* v *Rothwell* (1858) E B & E 168 *White* v *France* (1877) 2 C P D 308 *Hayward* v *Drury Lane Theatres* [1917] 2 K. B 899 914 *Mersey Docks and Harbour Board* v *Procter* [1923] A C 253 259 *Sutcliff* v *Clients Investment Co* [1924] 2 K. B 746 *Lakhmichand* v *Ratanbai* (1926) 29 Bom. L R 78 *Mack* v *M & S M Railway Co* (1922) 45 M L J 424

[4] *Norman* v *G W Ry Co* [1915] 1 K. B 584 592 *Pritchard* v *Peto* [1917] 2 K B 173

[5] *Mersey Docks and Harbour Board* v *Procter* sup

So far as he sets foot on so much of the premises as lie outside the invitation or uses them for purposes which are alien to the invitation he is not an invitee but a trespasser and his rights must be determined accordingly [1]

An invitee, e g a customer is protected not only while he is actually doing his business but while he is entering and leaving [2]

The occupier is however not liable if the plaintiff was liable for contributory negligence [3] or had knowledge of the risk and with such knowledge he voluntarily exposed himself to it [4]

The duty of a railway company towards persons resorting to their stations and yards in the ordinary course of business is not higher than that of the occupier of private premises towards invitees resorting to such premises The duty is to take reasonable care that their premises are reasonably safe for persons using them in the ordinary and customary manner and with reasonable care [5]

(*b*) The duty of the occupier is greater in respect of class (*b*) Where the occupier of premises agrees for reward that a person shall have a right to enter and use them for a mutually contemplated purpose, the contract between the parties contains an implied warranty that the premises are as safe for that purpose as reasonable care or skill on the part of any one can make them The rule is subject to the limitation that the defendant is not to be held responsible for defects which could not have been discovered by reasonable care or skill on the part of any person concerned with the construction alteration, repair or maintenance of the premises But subject to this limitation it matters not whether the lack of care or skill be that of the defendant or his servants or that of an independent contractor or his servants or whether the negligence takes place before or after the occupation by the defendant of the premises The principle is basic and applies alike to premises and to vehicles It matters not whether the subject be a race stand a theatre or an inn whether it be a taxicab an omnibus or a railway carriage The warranty in each case is the same, and for a breach thereof an action will lie. [6]

The above principle puts on the defendant a greater obligation than exists with respect to a mere invitee.

[1] Per Lord Atkin in *Hillen and Pettigrew* v *I C I (Alkali) Ltd* [1936] A. C 65 69

[2] *Chapman* v *Rothwell* (1858) E B & E 168

[3] *Clayards* v *Dethick* (1848) 12 Q B D 439

[4] *Smith* v *Baker* [1891] A C 325 *Thomas* v *Quartermain* (1887) 18 Q B D 685 *Letang* v *Ottawa Electric Ry Co* [1926] A C 725

[5] *Norman* v *G W Ry Co* [1915] 1 K. B 584 592

[6] Per McCardie J in *Maclean* v *Segar* [1917] 2 K B 325 337 *Francis* v *Cockrell* (1870) L R. 5 Q B 184 501 *Hayward* v *Drury Lane Theatre* [1917] 2 K B 899 914 *Liebig s Extract of Meat Co* v *Mersey Docks & Harbour Board* [1918] 2 K B 381 See *Lindsey County Council* v *Mary Marshall* [1937] A C. 97 106 107 *Weigall* v *Westminster Hospital* [1936] 1 All E R. 232

Leading case—INDERMAUR *v* DAMES

Class (*a*)—Falling through open shaft—In the leading case A a journey man gas fitter was testing some new burners in B s sugar factory On the pre mises was an unfenced shaft used by B in working hours for raising and lower ing sugar Without want of reasonable care on his part, A while on the upper floor fell through this shaft. B had in this case not exercised the care of a prudent man towards A who was induced to come on the business and interest of B As A was not accustomed to the premises B should have had the shaft fenced off or have called A s attention to the danger in such a way a to im press upon him the necessity of care to avoid it.[1]

Insecure staging—Dockowners who erected a staging round a vessel in their dock for the purpose of repairing it were responsible for injuries occasioned to a workman employed by the shipowners in repairing the vessel The staging had been handed over to the shipowners and was in their control But it was considered that persons coming on business to the vessel in the dock of the defendants came on business in which the defendants were interested and that the persons so coming must be considered as invited by the dockowner[2]

Insecure gangway—Where the plaintiff was injured while going over a gang way which the defendants had provided for the passage from their dock to a ves sel lying adjacent and the gangway was in an insecure position to the knowledge of the defendants it was held that the defendants were liable as the plaintiff went on board a ship in the dock at the invitation of one of the ship s officers.[3]

Insecure hatch covering—The plaintiffs were members of a stevedores gang employed to load a steamship from the defendants barge The cargo in the hold of the barge consisted of bicarbonate of soda in bags and soda in kegs on the top of the bags The foreman required the bags to be loaded before the kegs The kegs were therefore laid along the deck of the barge to enable the bags to be slung on board the steamer by the ships derricks. After this had been done the crew of the barge replaced the hatch covers on the after portion of the hatch unsupported by the fore and aft beam The engineer threw a sling on one of the hatch covers and the plaintiffs placed seven kegs in the sling When they were moving the eighth keg the hatch covers gave way and the plaintiffs fell into the hold and were injured The men knew that it was dangerous and im proper to load cargo off the hatch covers. It was held that the plaintiffs had no cause of action against the defendants because the crew of the barge had no authority to invite the plaintiffs to use the hatch covers for the purpose for which or in the way in which they were used that the plaintiffs in so using the hatch covers were trespassers, and not invitees of the respondents and that even if they were invitees they were guilty of contributory negligence[4]

Falling of cornice—The plaintiff went to the house of the defendant to collect money due to him from her while he was standing upon the door step a piece of projecting cornice from the top of the house fell on his head and injured him The house was in apparently good repair and the defendant did

[1] *Indermaur v Dames* (1866) L R 1 C P 274

[2] *Heaven v Pender* (1883) 11 Q B D 503 *White v France* (1877) 2 C P D 308

[3] *Smith v L & St K D Co* (1868) L R 3 C P 326 See *Marney v Scott* [1899] 1 Q B 986

[4] *Hillen and Pettigrew v I C I (Alkali) Ld* [1936] A C 65

not know of the defect in the cornice. The defect which was an old one was due to the action of the weather upon the cement It was held that the plaintiff was not entitled to recover inasmuch as the defendant s duty was to take reasonable care to keep the house in such a state of repair as not to expose the plaintiff to any hidden danger of which the defendant was aware or ought to have been aware and the plaintiff had not shown that she was aware or ought to have been aware of the decay of the cornice[1]

Class (*b*) —Injury in theatre—The defendant the lessee and manager of a theatre had arranged for the performance of a play in his theatre with a theatrical company Each party took a certain proportion of the receipts. The plaintiff took and occupied a seat in the theatre during the performance an actor fired a pistol which should have contained only a blank cartridge but in the barrel of which by some unexplained mischance, there was also a sport cartridge of smaller size above the blank cartridge. The actor who fired the pistol pointed it towards the audience and the sport cartridge was driven out like a bullet and hit the plaintiff on the wrist, causing her serious injury It was held that the defendant owed the plaintiff a duty to use reasonable care that she was not exposed to unusual danger the existence of which the defendant either knew or ought to have known[2]

Injury at motor race course —The plaintiff who had paid for permission to be a spectator of motor car races at a track owned by the defendant company was injured by the occurrence of a collision between two of the cars, one of which was thrown into the enclosure where the spectators were but there was no evidence that there was anything wrong with the track which had been in use for more than twenty years. It was held that the defendant company were under no obligation to protect a spectator against a danger which was incident to the spectacle and which any reasonable spectator would foresee and therefore they were not liable It was the duty of the defendants to see that the course was as free from danger as reasonable care and skill could make it, but they were not insurers against accidents which no reasonable diligence could foresee or against dangers inherent in a sport which any reasonable spectator can foresee and of which he takes the risk[3]

Fall from railway platform —The plaintiff sustained injuries by falling into an unprotected and unlighted pit on the defendant railway company's platform on a night when he was waiting for a train and while he was trying to use a latrine. It was held that the defendants were liable in damages in not having kept the place lighted at the time.[4]

Fall on polished floor of hospital —The plaintiff the mother of a patient occupying for payment, a private ward in a hospital desired to consult one of its honorary surgeons, with whom she had a personal contract for the treatment of her son. He invited her to a small room the floor of which was highly polished. She trod on a mat, which slid along the floor beneath her foot so that she fell and suffered personal injury It was held that the mat was an usual danger of which the hospital authorities ought to have known and they were therefore

1 *Pritchard* v *Peto* [1917] 2 K. B 173

Cox v *Coulson* [1916] 2 K B 177

3 *Hall* v *Brooklands Auto racing Club* [1933] 1 K B 205

4 *Mack* v *The Madras & Southern Mahratta Rly Co* (1923) 45 M L J 424 See *Schlarb* v *L N E R Co* [1936] 1 All E R 71

liable.[1]

4 In regard to persons lawfully passing by the premises the duty extends to guarding against what may happen just beyond the premises on the road or other place where a person passing by may lawfully be. If a person for instance, puts up a lamp projecting from his premises over the public footpath it is his duty to maintain it in a safe state of repair If an injury is caused by the falling of the lamp on a passer by for want of repairs he cannot be allowed to ride off by saying that he had employed a competent person to do the repairs Where it is the duty of persons to do their best to keep premises or a structure, of whatever kind it may be in a proper condition and we find it out of condition and an accident happens therefrom it is incumbent upon them to shew that they used that reasonable care and diligence which they were bound to use, and the absence of which it seems to me may fairly be presumed from the fact that there was the defect from which the accident has arisen [3] Where a heavy object is suspended over a highway and must fall into it unless supported by artificial means which can only be kept in order by the person in possession of the premises such person is bound absolutely to maintain the attachments [4]

Where passers-by were injured by the falling of a brick from a bridge [5] a barrel of flour from a window [6] a packing case [7] a bag of sugar from a crane [8] or a defective shutter from a house abutting on a highway [9] or by the stump of a wall projecting about six to eight inches above the level of the road [10] it was held that they could recover damages

The defendants planted trees in certain of their highways, and surrounded each tree with an iron spiked guard. Subsequently to the erection of the guard an order was promulgated under the Defence of the Realm Regulations by which all street lights were ordered to be extinguished at a certain hour The plaintiff who was crossing a road at night in the darkness came into contact with one of the guard and suffered very serious injury In an action to recover damages for negligence it was held that after the promulgation of the lighting order there was a continuing duty on the defendants to take reasonable measures to prevent the guard from being a danger to the public lawfully using the road and the plaintiff was entitled to maintain his action [11] A railway company erect

1 *Wegall v Westminster Hospital* [1936] 1 All E R 232

Tarry v Ashton (1876) 1 Q B D 314 320

Per Cockburn C J in *Kearney v London Brighton Ry Co* (1870) L R 5 Q B 411 415 *Laugher v Pointer* (1826) 5 B & C 547 576 *D Souza v Cassamalli Jairajbhoy* (1933) 35 Bom L R 1007 *Kuppammal v M & S M Ry Co Ltd* (1937) 46 L W 452 [1937] M W N 921

4 *Noble v Harrison* [1926] 2 K B 332 338

5 *Kearney v London Brighton Ry Co* sup

6 *Byrne v Boadle* (1863) 2 H & C 722

7 *Briggs v Oliver* (1866) 35 L J Ex 163

8 *Scott v London Dock Co* (1865) 3 H & C 596

9 *Wilchick v Marks and Silverstone* [1934] 2 K B 56

10 *Shelton v Marriot* (1888) 59 L T 61

11 *Morrison v Lord Mayor etc of Sheffield* [1917] 2 K B 866

ed in the public highway certain gate posts from which collapsible steel gates could be run across the road so as to close the entrance to the station yard. A taxicab driver while driving his cab on a dark rainy night into the station yard collided with one of these posts which was invisible owing to the darkening of the street in compliance with the Reduction of Lighting Regulations and thereby damaged his cab In an action by the cab driver against the railway company for damages it was held that the accident arose from the existence of the gate-post which had been legalized by a statute coupled with the diminution of light necessitated by the exigencies of the war and that therefore the company was not guilty of negligence.[1]

A branch of a tree growing on the defendant's land overhung a highway The branch suddenly broke fell upon the plaintiff's vehicle which was passing along the highway and damaged it The defendant did not know that the *branch was dangerous. The fracture was due to a latent defect not discoverable* by any reasonably careful inspection It was held that the mere fact that the branch overhung the highway did not make it a nuisance and that the defendant was not liable inasmuch as he had not created the danger and had no knowledge actual or imputed of its existence[2]

Injury to child from spiked wall—In front of a window of the defendant's shop and immediately abutting on a public highway was a low wall eighteen inches high the defendant's property on the top of which was a row of a sharp spikes. The plaintiff a child of five was found standing by the wall bleeding from a wound such as might have been caused by her falling upon the spikes. It was held that there was evidence that the injury was caused by th wrongful act of the defendant, in maintaining the nuisance while the plaintiff was using the highway in a proper manner[3]

Liability of owner or occupier of land adjoining highway—An owner or occupier of land adjoining an ordinary highway is not bound to fence it so as to prevent harmless animals like sheep from straying upon the highway[4] Where a danger has been created on a highway by something done on the highway and not by anything done on the adjoining land the owner of the adjoining land is not bound to make any alteration on or to his land to do away with that danger Thus where in consequence of a highway having been made up by a highway authority the level of the adjoining land which is unfenced has been lowered so as to cause a dangerous drop from the edge or kerb of the reconstructed highway and a pedestrian slips down from the highway on to the adjoining land and is thereby injured the owner of the adjoining land is not liable but the highway authority is[5]

Children

If children are trespassers the only duty of the landowner is not to injure them intentionally or to put dangerous traps for them intending

[1] *Great Central Railway v Hewlett* [1916] 2 A C 511

[2] *Noble v Harrison* [1926] 2 K B 332

[3] *Fenna v Clare & Co* [1895] 1 Q B 199

[4] *Heath's Garage Ltd v Hodges* [1916] 2 K B 370

[5] *Nicholson v Southern Ry Co* [1935] 1 K B 558.

to injure them, but he is under no liability if in trespassing they injured themselves on objects legitimately on his land in the course of his business Against those he is under no obligation to guard trespassers [1] Here it is hard to see how infantile temptations can give rights however much they may excuse peccadilloes A child will be a trespasser still if he goes on private ground without leave or right however natural it may have been for him to do so [2]

To make a landowner liable for injury to children on his land it must be proved that he expressly or impliedly invited them on to his land and either did an act which caused damage with knowledge that it might injure them, or knowingly permitted the existence on his land of a hidden danger or trap An invitation may be implied from knowledge that children frequented the land without interference For obvious dangers such as unguarded water natural or artificial the land owner is not liable.[3]

The duty the owner of premises owes to the persons to whom he gives permission to enter upon them must be measured by his knowledge actual or imputed of the habits capacities and propensities of those persons [4] If the owner of any premises on which dangerous and alluring machines or vehicles are placed give leave to boys of a mischievous and intermeddling age, or to children of such tender years as to be quite unable to take care of themselves to enter upon the premises he will be responsible for any injury the boys or children may sustain [5] Thus a measure of care appropriate to the inability or disability of those who are immature or feeble in mind or body is due from others who know of or ought to anticipate the presence of such persons within the scope and hazard of their own operations [6] The only difference in the duty towards children is that more care is necessary in their case than in the case of adults

Trespassers —Injury by machine —A boy of four years was killed by being crushed in the iron wheel of a haulage system situated in a field which was surrounded by a hedge which was inadequate to keep out the public The defend ant company knew that the field was used as a playground by young children who were at times warned out of the field The wheel was dangerous and attractive to children and at the time of the accident it was insufficiently protected The boy had been warned by his father not to go near the field or the wheel. In an action by the father against the company it was held that the boy was a tres

[1] *Hardy v Central London Ry Co* [1920] 2 K B 459 573 *Robert Addie & Sons v Dumbreck* [1929] A. C 358 367 *Liddle v Yorkshire (North Riding) County Council* [1934] 2 K B 101 111

[2] Per Hamilton L J in *Latham v Johnson* [1913] 1 K B 398 415

[3] Per Scrutton L J in *Liddle v Yorkshire (North Riding) County Council* [1934] 2 K B 101 112

[4] *Cooke v Midland Great Western Railway of Ireland* [1909] A C. 229 238

[5] *Ibid Latham v Johnson Ltd* [1913] 1 K B 398 416 *Excelsior Wire Rope Co v Callan* [1930] A. C. 404

[6] Per Lord Sumner in *Glasgow Corporation v Taylor* [1922] 1 A C 44 67

passer and went on the company's premises at his own risk and that the company owed him no duty to protect him from injury[1] The defendants who were owners of a dangerous machine allowed children to frequent the spot where the machine was used and to play with it. On one occasion when the machine was worked two children were caught in a pulley and their hands were crushed In an action against the defendants it was held that it being well known to the defendants that when the machine was going to start it was extremely likely that children would be near it the duty owed by the defendants when they set the machine in motion was to see that no child was in such a position as to be exposed to danger by the occasional use to which the machine was put and that they had failed in that duty The immediate danger being apparent it was not material whether the children were or were not trespassers.[2]

Injury by falling of tree—A piece of land adjoining a highway was unfenced and used as a playground by children without any license from the owner The defendant was engaged by the owner to fell a large elm tree On the day on which the tree was expected to fall there were many children on the land and they were driven away more than once When the last root was cut and the tree was expected to fall no further warning was given and the plaintiff a boy of ten years was injured In an action by the plaintiff it was held that the defendant owed a duty even to a trespasser not to do any act, which would alter the condition of the land and might injure him without giving him warning and that therefore he was liable.[3]

Running over by train—The plaintiff a child two and a half years old, lived with his parents in a house in front of which was a highway On the other side of the highway there was a fence and inside the fence there was a siding a file of wooden railway sleepers, and beyond them the main line of the defendant company's railway The plaintiff got through the fence and when on the main line was run over by an express train sustaining serious injury The company's servants knew that children were in the habit of playing on the files of sleepers In an action against the company it was held that the leave and licence if any to play on the file of sleepers was confined to that spot and did not extend to the main line that there was no duty on the company to fence off the sleepers from the rest of their land and that the company was not liable[4]

Injury by falling of stone—The plaintiff aged two years, strayed alone a short distance into the defendant's unfenced croft and was found there shortly after sitting on a large stone with another on her hand three fingers of which were badly crushed. Adults and children habitually entered the croft, some using it as a short cut, some simply playing there to the knowledge of the defendants. There was a large heap of paving stones lying there and a load of stones had been shot shortly before the accident. In an action by the plaintiff it was held that there being neither allurement nor trap nor invitation nor *dangerous object placed upon the land* the defendants were not liable.[5]

Injury by falling from heap of earth—In the course of carrying out a road

[1] *Robert Addie & Sons* v *Dumbreck* [1929] A. C 358
[2] *Excelsior Wire Rope Co* v *Callan* [1930] A C 404
[3] *Mourton* v *Poulter* [1930] 2 K B 183
[4] *Jenkins* v *Great Western Ry* [1912] 1 K B 525
[5] *Latham* v *Johnson Ltd* [1913] 1 K B 398

improvement the defendants workmen had to excavate a large quantity of oil which till it could be cleared away was placed on the new verge of the road against a new retaining wall which the defendants had built. This heap of soil formed a slope giving easy access to the top of the wall Children played about the works but were always warned off when workmen were there. One day after the workmen had left two boys were sitting on the new wall and seeing them there the plaintiff a boy of seven years of age who also had been previously warned off climbed up the heap and sat on the wall between the other two and in trying to show them how bees flew he waved his arms and losing his balance fell backwards and sustained injuries in respect of which he sued the defendants. It was held that he was a trespasser to whom the defendants owed no duty [1]

Licensees —Fall through gap in railings —The plaintiff a little boy of four one day accompanied his sister to the defendant s house, where she was going on business. The girl went up the defendant s steps all right but the little boy tumbled through a gap in some railings out of repair into the area below It was held that no action could be maintained, as the little boy s position could be placed no higher than that he was there lawfully and was not a trespasser and that being so the only duty on the part of the defendant towards him was to take care that there was no concealed danger and of this there was no evidence [2]

Injury by dangerous machine —A railway company kept a turn table un locked (and therefore dangerous for children) on their land close to a public road The company s servants knew that children were in the habit of going over the land and playing with the turn table to which they obtained easy access through a well worn gap in a fence which the railway company were bound by a statute to maintain A child between four and five years old playing with other children on the turn table having been seriously injured it was held that the railway company was liable for negligence [3] This case is treated as the case of a child impliedly licensed to use a plaything which was for a child a trap [4]

Injury by poisonous berries —The plaintiff brought an action against the defendants, the Corporation of Glasgow for damages for the death of his son who died as the result of eating the berries of a poisonous shrub growing in their botanic gardens which were open to the public. The gardens were much frequented by children and the enclosed piece of ground where the shrub grew was accessible by a gate which could be easily opened by young children The plaintiff s son with some other children entered the garden and ate some of the berries which presented a tempting appearance to children The defendants knew that the berries were a deadly poison but took no precaution to warn children of the danger of picking the berries or to prevent them from doing so It was held that the defendants were liable [5]

[1] *Liddle v Yorkshire (North Riding) County Council* [1934] 2 K B 101

[2] *Burchell v Hickkison* (1880) 50 L J Q B 101

[3] *Cooke v Midland Great Western Ry of Ireland* [1909] A C 229 The children in this case were not trespassers but licensees. The word trespassing in the head note is held to be inaccurate see *Latham v Johnson Ltd* [1913] 1 K B 398 418.

[4] *Liddle v Yorkshire (North Riding) County Council* sup p 111

[5] *Glasgow Corporation v Taylor* [1922] A C 44

LEVEL CROSSING

Railway companies are always bound by statutes to keep closed the gates of the railway at level crossings at those times at which it would be dangerous to allow the public to cross the line If this duty is not performed and a passenger along the highway is in attempting to cross the line of railway injured the leaving of the gates open is evidence of negligence on the part of the railway company even though with care and circumspection he might have been able to see at a distance the approach of the train which occasioned the injury[1] If the gates of the railway at a place where it crosses the highway at a level are open it amounts to a statement and a notice to the public that the line, at that time is safe for crossing[2] Care should be exercised by the driver of an engine when he proposes to cross at night an unfenced level crossing laid across a public highway[3] Mere allegation or proof that the company was guilty of negligence in such cases is altogether irrelevant the plaintiff must allege and prove not merely that the company was negligent but that its negligence caused or materially contributed to the injury[4]

A railway company allowing the public to cross the line otherwise than by a level crossing is not in duty bound to use care to protect the public but if it is such a place where people are in the habit of crossing the company has to take reasonable precaution in the use of the spot even though there is no right of way there[5]

[1] *Directors etc of North Eastern Ry Co* v *Wanless* (1874) L R 7 H L 12

[2] Ibid *Stapley* v *L B & S C Ry* (1865) L R 1 Ex 21 See *Bengal Provincial Ry Co* v *Gopi Mohan* (1913) 41 Cal 308 *Bengal and North Western Railway Company Ltd* v *Matukdhari Singh* (1937) 16 Pat 627

[3] *Abdul Latiff* v *Pauling & Co* (1916) 19 Bom L R 167 171

[4] *Wakelin* v *London & South Western Ry Co* (1886) 12 App Cas. 41 In this case the dead body of a man was found on the line near the level crossing at night the man having been killed by a train which carried the usual head lights but did not whistle or otherwise give warning of its approach No evidence was given of the circumstances under which the deceased got on to the line. It was held that even assuming that there was evidence of negligence on the part of the company yet there was no evidence to connect such negligence with the accident and that the company was not liable This case is distinguished in *Jones* v *Great Western Ry Co* (1931) 47 T L R 39 Jones worked at a factory in front of which ran a railway siding belonging to the defendants that had to be crossed to obtain access to the works. He was killed by being crushed between the buffers of two trucks during shunting operations. No one saw the accident happen and there was no evidence how he got between the buffers. The defendants had employed a man to give warning to any one before the train was shunted but he did not see the deceased and therefore did not give him any warning It was held that as there was an absence of warning an inference could be drawn that the injury was due to the absence of that warning and that the defendants were liable for negligence In *M & S M Railway Co Ltd* v *Jayammal* (1924) 48 Mad 417 a girl of seven years was knocked down by an engine of the defendants while she was crossing the railway line but she was held guilty of contributory negligence

[5] *Bengal Nagpur Railway Company Limited* v *Taraprasad Maity* (1927) 48 C L J 15 To render a

S attempted to cross a railway line at night at a spot where persons were in the habit of crossing with the acquiescence of the company At the time he attempted to cross, there was a train standing still on the up line in such a position as to prevent a person on the line behind it from seeing anything approaching on the down line S came from behind the train on the up line and crossing on to the down line was struck by an express train and killed. It was held that the company was liable for negligence [1] The plaintiff a medical doctor whose time was of pecuniary value was while driving along a public highway detained for twenty minutes at a level crossing by the unreasonable and negligent delay of the servants of the defendant railway company in opening the gates at the crossing It was held that the defendants were liable in damages to the plaintiff for such delay Where the plaintiff s elephant was hit and killed by a train at a level crossing which was not guarded by a gate-keeper and the gates had not been closed before the approach of the train and there was no unreasonable conduct on the part of the driver of the elephant, it was held that the defendant railway company was liable [3]

Where the plaintiff who was travelling in his car at the speed of seven miles an hour finding the gates of a level railway crossing open tried to cross the rail and while doing so a railway engine collided against his car and broke it it was held that the plaintiff was not guilty of contributory negligence and that he was entitled to recover damages from the railway company [4]

INVITATION TO ALIGHT

The announcement of the name of a station coincident with the stoppage of the train thereat and its coming to a complete standstill is in the absence of a warning to the passengers to keep their seats an invitation to alight [5] If a passenger gets out of the train under these circumstances he is not guilty of any want of reasonable care An invitation to passengers to alight on the stopping of a train without any warning of danger to a passenger who is so circumstanced as not to be able to alight without danger such danger not being visible and apparent amounts to negligence [6]

railway company liable for the omission on the part of the driver to whistle it is necessary to prove that the driver has been guilty of a breach of duty or an error of judgment or that he saw the danger and failed to give warning Failure to whistle is not the omission of any statutory precaution but in certain circumstances it may be reasonable to whistle and failure to do so may be evidence of negligence No absolute rule can be laid down as to the circumstances under which the driver would be bound to whistle notwithstanding that it is not a statutory duty to do so but that duty arises only where the circumstances call for a warning to be given *ibid*

[1] *Dublin Wicklow and Wexford Ry Co* v *Slattery* (1878) 3 App Cas 1155 *Rogers* v *Rhymney Ry* (1872) 26 L. T 879 *Clarke* v *Midland Ry* (1880) 43 L T 381 *Smith* v *South Eastern Ry* [1896] 1 Q B 178 *Mercer* v *S E & C Ry Co* [1922] 2 K B 549

[2] *Boyd* v *Great Northern Ry* [1895] 2 I R. 555

[3] *Bengal and North Western Railway Company Ltd* v *Matukdhari Singh* (1937) 16 Pat. 672

[4] *Daya Shankar* v *B B and C I Railway* [1931] A. L. J 847

[5] *Weller* v *London Brighton & South Coast Ry* (1874) L. R. 9 C P 126 *Bridges* v *North London Ry Co* (1873) L. R. 7 H L. 213

[6] *Cockle* v *London & South Eastern Ry Co* (1872) L. R 7 C. P 321 326

Railway companies are bound to find at every station reasonable means for passengers to alight [1] Passengers are equally bound to use reasonable care in alighting on the platform or elsewhere where it becomes necessary for them to alight [2] If for instance a train overshoots a platform a thing which very often happens a passenger is bound to see whether or not the train is shunted back and to take reasonable care when he gets down otherwise the railway company will not be liable [3] The test is—was the place where the plaintiff was required to alight a safe or dangerous place, that is was it a place where persons of ordinary intelligence and physical capacity exercising reasonable care could alight without risk of injury ?[4] The mere fact of the end of a train passing the platform, where the passenger can safely alight is not of itself evidence of negligence for it is *impossible always to regulate the speed of the train and sometimes* the platform may not be long enough But when this happens it becomes the duty of the company to take measures for the safety of the passengers in the carriages beyond the platform They are not to be exposed to unnecessary danger the train may be backed and in the meantime the passengers may be warned to keep their seats until it is backed If being so warned they choose to get out and expose themselves to unnecessary danger that is their fault and in such circumstances the company would not be liable. But if that course is not adopted and the train does not back the passengers should be asked if they will alight and the porters should assist them in getting out—such of them at least as may require such assistance—at all events something should be done to prevent their incurring unnecessary danger [5]

In India the foregoing principles have been followed and it has been held that mere overshooting is not necessarily or by itself negligence. There must be something more in order to entitle the plaintiff to claim damages on the ground of negligence of the railway company [6]

On the approach of a train to a station a porter called out the name of the station and the train was brought to a standstill Hearing carriage doors opening and shutting and seeing a person alight from the next carriage the plaintiff stepped out of a carriage but the carriage in which he was having

[1] *Robson v North Eastern Ry Co* (1876) 2 Q B D 85

[2] *Praeger v Bristol and Exeter Ry Co* (1871) 24 L T N S 105

[3] *Lewis v London Chatham & Dover Ry* (1873) 43 L. J Q B 8 *Siner v Great Western Ry Co* (1869) L R 4 Ex 117

[4] *Owen v Great Western Ry Co* (1877) 46 L J Q B 486

[5] Per Cockburn C J in *Rose v North Eastern Ry Co* (1876) 2 Ex D 248 250 In this case a railway train drew up at a station with two of the carriages beyond the platform The servants of the company called out to the passengers to keep their seats but were not heard by the plaintiff and the other passengers in one of these carriages After waiting some little time and the train not having put back the plaintiff got out, and in so doing fell and was injured. It was held that the railway company was liable for negligence.

[6] *Kessowjee v G I P Ry Co* (1904) 6 Bom. L R 673 (1904) 7 Bom. L. R. 119 (1907) 9 Bom L R 671 34 I A 115

overshot the platform he fell on to the embankment and was hurt. It was night and there was no light near the spot and no caution was given nor anything done to intimate that the stoppage was a temporary one only or that the driver intended to back the train. It was held that the company was liable for negligence on the part of its servants[1] But where under similar facts a porter had shouted to the passengers to keep their seats but the plaintiff failed to hear him as he was asleep and got out in a hurry without looking to see what he was stepping on and fell five feet below and was injured it was held that the company was not liable as he was guilty of contributory negligence[2] A railway train drew up at a small station with the engine and part of one of the carriages beyond the platform. A passenger in that carriage having parcel in her hands, opened the door and waited on the iron step some time for assistance but no one coming to assist, she fearing that the train would move on tried to alight by getting on to the footboard and in so doing fell and injured herself It was held that she was entitled to maintain an action against the company[3] The mere stopping of a train and calling out the name of a station is not in all cases evidence of an invitation to alight. The plaintiff was a passenger by the defendants railway to Bromley station As the train arrived there she heard Bromley Bromley called out several times. The train was brought to a stand till but not before it had partly overshot the platform As the plaintiff was in the act of getting out and when her foot was on the step of a carriage the train was put back with a jerk and she fell on the platform The period occupied by the stoppage of a train was little more than momentary and the plaintiff knew the station well it was held that there was no evidence of negligence on the part of the defendants[4]

Indian cases—The plaintiff was a passenger travelling on the defendants railway and received severe injuries from a fall which he experienced in stepping upon the platform when the train stopped. It was held that the railway company was guilty of negligence in not keeping the station properly lighted in allowing the train to overshoot the station and in not warning the plaintiff against alighting[5] The plaintiff was a passenger in a railway train of the defendant company At the station where the plaintiff had to get out of the carriage the train overshot the platform and the plaintiff on the implied invitation of the defendants alighted where the train stopped. The place was dark and there were no lamps No warning was given to the plaintiff that the train had passed the platform or that special care must be taken in descending. The plaintiff fell heavily and was seriously injured. It was held that the company was liable in damages.[6]

PERSONS PROFESSING TO HAVE GREATER SKILL

Where it is evident that persons hold themselves out to be persons

[1] *Weller* v *L B & S C Ry* (1874) L R 9 C P 126 *Praeger* v *B & E Ry* (1871) 24 L T N S 105 *Sharpe* v *Southern Railway* [1925] 2 K B 311

[3] *Robson* v *N E Ry* (1876) 2 Q B D 85 See *Owen* v *G W Ry* (1877) 46 L J Q B 486

[4] *Lewis* v *L C D Ry* (1873) 43 L J Q B 8 See *Harrold* v *Great Western Ry Co* (1866) 14 L T 440.

[5] *Woodhouse* v *C & S E Ry* (1868) 9 W R 73

[6] *Kessowiee* v *G I P Ry* (1907) 34 I A. 115 9 Bom. L. R. 671.

of skill they are bound to exercise skill It is not enough that the defendants have acted *bona fide* and to the best of their skill and judgment They are bound to conduct themselves in a skilful manner Of this class are—

1	Directors of companies	4	Physicians and Surgeons
2	Carriers	5	Solicitors
3	Innkeepers	6	Bankers
	7 Manufacturers.		

I DIRECTORS OF COMPANIES

Directors of a company ought to show more than ordinary care towards the shareholders for they are persons holding themselves out as *capable of directing complicated affairs and inviting persons to trust* their money to the company which they profess to direct They are unlike trustees who undertake irksome duties for no pay or advantage for they are always either paid or deriving some benefit or advantage from their position They must show diligence which good men of business are accustomed to show [1]

2 CARRIERS

(*a*) Carriers of goods (*b*) Carriers of passengers

(*a*) *Carriers of goods*

Anyone who undertakes to carry the goods of all persons indifferently for hire is a common carrier [2]

Common carriers are generally of two descriptions (*a*) Carriers by land and (*b*) carriers by water

(*a*) Carriers by land are the proprietors of stage coaches omnibuses and motor lorries which ply between different places and carry goods for hire So are truckmen cartmen and porters who undertake to carry goods for hire from one town to another or from one part of a town to another But furniture removers are not liable as common carriers [3]

(*b*) Carriers by water are the owners and masters of ships whether they are regular packet ships or carrying smacks or coasting ships or other ships carrying general freight So are the owners and masters of steam boats engaged in the transportation of goods for persons generally for hire

Duties —A common carrier is bound to carry all goods offered for transportation by any person whatsoever upon receiving a suitable hire He must take the utmost care of goods from the moment of receiving them [4]

[1] *Catchpole* v *Ambergate etc Ry* (1852) 1 El & Bl 111

Gisbourn v *Hurst* (1709) 1 Salk 249

[3] *Watkins* v *Cottel* [1916] 1 K B 10

[4] *East Indian Ry Co* v *Sispal Lal* (1911) 14 C L J 472 See *Lakhichand* v *G I P Ry* (1911) 14 Bom L R 165

If the carriage is to be by water carriers are bound to provide a ship tight, staunch and strong and suitably equipped for the voyage with proper officers and crew to guard against all injuries incident to the property by reasonable care in preserving the goods from the effects of storms or bad air of leakage, and of embezzlements

Every carrier is bound to use all the diligence which prudent and cautious men, in the like business usually employ for the safety and preservation of the property confided to their charge [1]

Liability —A common carrier at common law is an insurer of goods committed to his charge and is responsible for their safe transport and delivery In case of loss or injury thereto he is therefore, as a rule liable, though there may have been no negligence on his part To this rule there is an exception when the loss or injury has been caused by an act of God the King s enemies or an inherent vice or defect in the goods carried and without negligence on the part of the carrier [2] The carrier may limit his liability by means of special contract or condition [3]

A railway company is under liability as a common carrier for loss of or damage to the luggage of a passenger not only where the luggage is placed in the luggage van but also where it is retained by the passenger as hand luggage unless the company can prove that the passenger assumed the immediate care of the luggage so retained and that the loss or damage was occasioned by his failure to exercise proper care of it The company is not relieved of this liability merely because the luggage is not in the carriage in which the passenger himself travels or is placed in a carriage of a higher class [4]

1 *Gill* v *Manchester S & L Ry Co* (1873) L R 8 Q B 186 *Lakhichand Ramchand* v *G I P Ry Co* (1911) 14 Bom L R 165

2 *Nugent* v *Smith* (1876) 1 C P D 423 See *Akhil Chandra* v *I G N & Ry Co* (1915) 21 C L J 565 *Surendra Lal* v *Secretary of State* (1916) 21 C W N 1125 *A C Dhar* v *Ahmed Bux* (1933) 37 C W N 559

If loss is caused owing to perils of the s a the defendant must prove it *Esufali* v *Taha Ummal* (1924) 47 Mad 610

3 *Price & Co* v *Union Lighterage Co* [1903] 1 K B 750 *Wyld* v *Pickford* (1841) 8 M & W 443 *Hajee Ismail Sait* v *Messageries Maritimes Co* (1905) 28 Mad 400 See Carriers Act (III of 1865) ss. 3 6 9 the Indian Contract Act (IX of 1872) s. 152 the Indian Railways Act (IX of 1890) s 72 The condition must not be inconsistent with the provisions of the Indian Carriers Act e g any condition exonerating the carrier from liability for the negligence of its servants or agents is void *River Steam Navigation Co Ltd* v *Jamunadas Ramkumar* (1931) 59 Cal 472 The Indian Contract Act does not apply to common carriers by sea and a common carrier cannot reduce his liability to that of a bailee under s 151 of the Contract Act. A common carrier cannot contract out of his common law liability *Alibhai* v *B I S N & Co* (1919) 12 B L T 173 See however *Dekhari Tea Co* v *Assam Bengal Ry Co* (1919) 47 Cal 6

4 *Vosper* v *Great Western Ry Co* [1928] 1 K B 340 *Great Western Ry Co* v *Bunch* (1888) 13 App Cas. 31 A railway company when sued for loss of goods entrusted to it for carriage may exonerate itself by proof of general care in dealing with large quantities of similar goods and proving that that amount of care is usually sufficient to prevent loss, damage or destruction

(b) *Carriers of passengers*

The duty of carriers of passengers is to take due care (including in that term the use of skill and foresight) to carry the passenger safely Carriers of passengers are of two descriptions—

(1) Passenger carriers on land

(2) Passenger carriers by water

(1) *Passenger carriers on land*

Duties —The passenger carriers on land are bound to carry passengers whenever they offer themselves and are ready to pay for their transportation and are not at liberty to refuse a passenger if they have sufficient room and accommodation

The proprietors are bound to provide road worthy vehicles suitable for the safe transportation of the passengers and also careful drivers of reasonable skill who are well acquainted with the road they undertake to drive.

The right which the passenger by railway has to be carried safely does not depend on his having made a contract but that the fact of his being a passenger casts a duty on the company to carry him safely [1]

Liabilities —Passenger carriers undertake to provide for the safe conveyance of those who engage them as far as human care and foresight could go *They are not liable for any accident* [2]

Railway companies are bound to use proper care and skill in carrying their passengers they are not liable as common carriers of passengers independently of negligence [3] They must take all such steps as skill prudence, and foresight can devise to keep passengers free from personal injury while travelling on its system [4] If an accident is caused by a latent defect in a vehicle which it is impossible, with the exercise of all due care caution and skill to have discovered the railway company is not liable [5] If there is a special contract absolving the railway company

Hirji Khetsey v *B B & C I Ry* (1914) 16 Bom. L R 467 If it is shown that the company has failed to take as much care of the goods as a man of ordinary prudence would, under similar circumstances take of his own goods of the same bulk quality and value it would be liable *Narsinggirji Manufacturing Co* v *G I P Ry* (1918) 21 Bom L R. 406 *Surendra Lal* v *Secretary of State for India* (1916) 21 C W N 1125

[1] *Austin* v *Great Western Ry Co* (1867) L R 2 Q B 442 445 *Christie* v *Griggs* (1809) 2 Camp 79 *Aston* v *Heaven* (1797) 2 Esp 533

[3] *East Indian Ry* v *Kalidas Mukerjee* [1901] A C 396 3 Bom L R. 293 28 Cal 401 *Shiam Narain Tikkoo* v *The B B & C I Ry Co* (1919) 41 All 488 See *Iswar Das* v *King Emperor* (1921) 1 Pat. 260 as to the liability of railway companies for overcrowding in railway compartments.

[4] *Jewan Ram Khettry* v *E I Ry Co* (1924) 51 Cal 861 If an accident is due to the train leaving the metals the railway company is liable for negligence unless it proves that it took all such steps as skilful prudent and foresighted persons under the circumstances would have taken to avoid the accident *ibid*

[5] *Readhead* v *Midland Ry* (1869) L R 4 Q B 379

from injury caused by their negligence no action lies[1]

In regard to their liability for the baggage of passengers railway companies stand upon the ordinary footing of common carriers[2] Baggage means such articles of necessity or personal convenience as are usually carried by passengers for their personal use, and not merchandise or other valuables although carried in the trunks of passengers which are not designed for any such use but for other purpose such as a sale and the like.

Death caused by explosives illegally introduced into railway carriage—Where a passenger was killed in a railway carriage by an explosive illegally introduced into it, it was held that the railway company was not liable in damages unless guilty of negligence in permitting the fireworks to be brought into the carriage. As it was not the duty of the company to search every parcel carried by a passenger the onus was on the plaintiff to show that the parcels containing the fireworks suggested danger[3]

Injury by falling of ladder in railway compartment—The plaintiff travelled in a second class compartment of a train on the defendant s railway The compartment carried a ladder to get to upper berths. The ladder when not in use was kept underneath one of the lower berths On the occasion in question some one had folded the ladder and kept it in a rack near the roof of the compartment The plaintiff went to sleep on one of the lower berths. After the train had proceeded an hour's journey the ladder fell on the plaintiff s head and caused him injury The plaintiff having sued to recover damages it was held that the defendants were not shown to have been negligent.[4]

(2) *Passenger carriers by water*

The law imposes upon carriers of passengers in ships and by inland navigation the same general obligations and responsibility with respect to the safety of passengers as it does upon carriers by land and except where particular Acts as the Merchant Shipping Act interfere they are bound by the same rule there being no distinction between them

3 INNKEEPERS

An innkeeper may be defined to be the keeper of a common [illegible] the lodging and entertainment of travellers and passengers their [illegible] and attendants for a reasonable compensation[5] A person who [illegible] mere private boarding or lodging house is not an innkeeper[6] A [illegible] house keeper makes a contract with every man that comes [illegible] innkeeper is bound without making any special contract, to [illegible] and entertainment for all at a reasonable price.[7]

[1] *Thomson* v *L M & S Ry Co* [1930] 1 K. B 41

[2] *Jenkyns* v *Southampton etc Steam Packet Co* [1919] 2 K. B 135

[3] *East Indian Ry* v *Kalidas Mukerjee* [1901] A C. 396

[4] *Vishnu* v *B B & C I Ry* (1923) 25 Bom [illegible]

[5] *Thompson* v [illegible] & Ald. 283

[6] *Packhurst* v [illegible] Salk. 38[illegible] *Danry* [illegible] (1854) 3 E & B [illegible]

[7] *Thompson* v [illegible]

Duties —An innkeeper is bound to take in all travellers and wayfaring persons if he can accommodate them, and he must guard their goods with proper diligence. If an innkeeper improperly refuses to receive or provide for a guest he is liable to be indicted therefor[1] But if all the rooms of an inn be full the innkeeper is under no obligation to provide a traveller with shelter and accommodation The common law liability of an innkeeper to provide accommodation continues so long as the guest is only a traveller[2] In the case, therefore of a person wishing to reside at a hotel the proprietor is not bound to allow him to remain after reasonable notice to quit has been given[3]

Liability —An innkeeper is liable for the safety of the goods which are brought within the inn. It is no excuse for the innkeeper that he delivered to the guest the key of the chamber in which he is lodged and that he left the chamber door open[4] The responsibility of an innkeeper for the safety of a traveller s property begins at the moment when the relation of guest and host arises and that relation arises as soon as the traveller enters the inn with the intention of using it as an inn and is so received by the host It does not matter that no food or lodging has been supplied or found up to the time of the loss It is sufficient if the circum stances show an intention on the one hand to provide and on the other to accept such accommodation Where a traveller is provided with accom modation and refreshment in an inn the fact that the expen es thereof are by agreement between the innkeeper and another person to be paid for by that other person does not prevent the relation of innkeeper and guest from arising and the innkeeper therefore incurs the customary liability for the safe custody of the travellers goods in the inn[5]

An innkeeper is not liable if the guest s ervant or friend steals or carries away his goods He is not an insurer of the goods of his guest but is liable for negligence[6]

The liability of the landlord of a boarding house in respect of luggage

1 *R* v *Ivens* (1835) 7 C & P 213

2 *Browne* v *Brandt* [1902] 1 K. B 696

3 *Lamond* v *Richard* [1897] 1 Q B 541

4 *Calye s* case (1584) 8 Co 32 *Morgan* v *Ravey* (1861) 6 H & N 265 See *Whateley* v *Palanji* (1866) 3 B H C (O C J) 137 where it was held that the common law of Eng land regulated the relation of a Parsi innkeeper and a European guest in Bombay and that an innkeeper was liable for the loss of the good of his guest without proof of actual negligence This case is however distinguished by the Allahabad High Court in a case in which it ha held that the Bombay decision has no application to the mofussil of India and that the liability of a hotel keeper to his guest is regulated by s. 151 of the Indian Contract Act Where therefore the property of a guest at a hotel was stolen from his room while he was at dinner in a different part of the hotel building and it was found that the room occupied by him was to the knowledge of the hotel keeper in an in ecure condition which the latter had taken no steps to rectify it was held that the hotel keeper was liable *Jan* v *Cameron* (1922) 44 All 735

5 *Wright* v *Anderson* [1909] 1 K B 209

6 *Dawson* v *Chamney* (1843) 5 Q B 164

is not co-extensive with the liability of an ordinary innkeeper But there is a duty on the part of a boarding house keeper to take reasonable care for the safety of property brought by a guest into his house[1] An inn keeper is bound only to supply such accommodation for the goods of his guests as he possesses and is not responsible for damage to those goods unless he is in default

The liability of an innkeeper with respect to the personal safety of his guest is less onerous He does not insure the personal safety of the guest The reason for the grave liability in the case of goods is to be found in the social conditions which existed when the liability first became estab lished The prevalence of highway robbery and the risk of possible collusion between the thief and the innkeeper account for the onerous burden on the latter with respect to goods The guest is an invitee and the innkeeper as the occupier of premises to which he has invited the guest is bound to take reasonable care to prevent damage to the guest from unusual danger which the occupier knows or ought to know of But further by reason of the contractual relationship existing between an innkeeper and a guest in the inn there is an implied warranty by the innkeeper that the inn premises are for the purpose of personal use by the guest as safe as reasonable care and skill on the part of any one can make them but the innkeeper is not responsible for defects which could not have been discovered by rea onable care or skill on the part of any person concerned with the construction alteration repair or maintenance of the premises[3] Thus the contractual relationship puts on an innkeeper a greater obligation than exists with respect to a mere invitee

Leading case—CALYE'S CASE

Theft of horse—In the leading case it was held that an innkeeper who at the request of his guest sent his horse to pasture and the horse was stolen was not liable for the loss[4]

Theft of overcoat—The plaintiff being on his way from his place of busi ness in Liverpool to his home outside the town went into the dining room of an hotel in Liverpool kept by the defendants, to get a meal and put his overcoat in a place where coats were ordinarily kept in that room. The coat was missing when he finished his meal It was held that there was no sufficient evidence to establish the relation of innkeeper and guest between the defendants and the plaintiff so as to make them liable for the loss of the coat without proof of negligence on their part.[5]

Theft of ring—The plaintiff and her husband arrived at the defendants hotel and engaged a room The plaintiff put her diamond ring which she was

[1] *Scarborough* v *Cosgrave* [1905] 2 K B 805 *Dansey* v *Richardson* (1854) 3 E & B 144 *Caldecutt* v *Piesse* (1932) 49 T L R 26

Winkworth v *Raven* [1931] 1 K B 652

[3] *Maclenan* v *Segar* [1917] 2 K B 325

[4] *Calye's* case (1584) 8 Co Rep 32 otherwise if the innkeeper had put the horse to grass of his own accord *Hawley* v *Smith* 25 Wend. 642

[5] *Orchard* v *Bush & Co* [1898] Q B 284

wearing into a jewel case and placed that in her suit case which she latched but did not lock When they went to dinner the husband locked the room and took the key with him After dinner they returned to their room and on leaving it to go to a dance the husband again locked it and handed the key in at the hotel office. They returned very late and got the key from the hall porter Next morning the plaintiff opened her suit case and jewel case and found that the ring was missing There was a notice in the room that all articles of value should be deposited at the office In an action by the plaintiff it was held that she had taken reasonable care of the ring and the fact that she had not deposited the ring at the office in compliance with the notice did not imply that she had retained the protection of it in her own hands to the relief of the defendants and that the defendants were liable [1]

Injury to guest—The plaintiff became a guest for reward to the defendant at his hotel and was given a room on the second floor Soon after midnight a fire arose in the upper part of the building The plaintiff was unaware of the position of the staircase and sought to escape from her room by means of a rope made of sheets and blankets She fainted when making her descent and fell upon a glass roof below whereby she suffered severe injuries In an action against the defendant for negligence it was held that, as he had omitted to make such inquiries as would have revealed to him the defects in his structure and the risks of fire thereby occasioned he was liable [2]

Damage to goods—The plaintiff a guest at the defendant s inn put his motor car in the inn garage which garage was open on one side In consequence of an unusually severe frost water in the engine froze and injured it. It was held that the defendant was not liable [3]

4 PHYSICIANS AND SURGEONS

Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill A surgeon does not undertake that he will perform a cure nor does he undertake to use the highest possible degree of skill as there may be persons of higher education and greater advantages than himself but he undertakes to bring a fair reasonable and competent degree of skill and in an action against him by a patient the question is whether the injury complained of must be referred to the want of a proper degree of skill and care in the defendant or not [4] If a jeweller pierces an ear of a woman he is not expected to take all those precautions which a surgeon would take

Negligent operation or administration of drug—The plaintiff brought an action against the governors of a hospital for damages for injuries alleged to have been caused to him during an operation by the negligence of some member

[1] *Carpenter v Haymarket Hotel Ltd* [1931] 1 K B 364

[2] *Maclenan v Segar* [1917] 2 K. B 325

[3] *Winkworth v Raven* [1931] 1 K. B 652

[4] *Lanphier v Phipos* (1838) 8 C & P 475 *Slater v Baker* (1767) 2 Wills 359 8 East 348 *Dryden v Surrey C C* [1936] 2 All E R. 535

In an action by a medical practitioner to recover the amount of his fees it is open to the defendant to lead evidence to show that he treated the patient ignorantly or improperly which plea, if proved furnishes a good defence to the action *Parreira v Gonsalves* (1905) 8 Bom. L. R 93

[5] *Phillips v Wm Whiteley* [1938] 1 All E R. 566

of the hospital staff It was held that the action was not maintainable[1] The Court said The only duty undertaken by the governors of a public hospital towards a patient who is treated in the hospital is to use due care and skill in selecting their medical staff The relationship of master and servant does not exist between the governors and the physicians and surgeons who give their services at the hospital and the nurses and other attendants assisting at an operation cease for the time being to be the servants of the governors, inasmuch as they take their orders during that period from the operating surgeon alone and not from the hospital authorities. The plaintiff's wife who had been admitted to a hospital to undergo an operation lost her life owing to an overdose of a dangerous drug administered to her just before the operation by two nurses at the hospital The overdose was due to a mistake on the part of the nurses in reading the amount ordered by the doctor to be administered The plaintiff brought an action against the nurses and the hospital authority It was held that the nurses were guilty of negligence and were liable but that the hospital authority was not liable as principals for the nurses negligence the only duty resting on the hospital being to see that the nurses who were engaged were duly qualified.[2]

Premature discharge of patient suffering from infectious disease from hospital —The defendants provided a hospital for persons suffering from infectious diseases. The plaintiff's son was treated in the hospital while suffering from an attack of scarlet fever He was discharged by the visiting physicians but after returning he communicated the disease to three other children of the plaintiff as he was prematurely discharged The plaintiff sued the defendant for the expenses to which he had been put in regard to the illness of the other children It was held that he could not recover as the defendants had employed a reasonably skilled and competent medical man[3]

Negligence of maternity home authorities to warn incoming patients of infectious disease —The above cases are distinguished in a recent case in which the plaintiff entered the defendant council's maternity home for her confinement Two cases of puerperal fever had occurred in the home and certain disinfecting precautions were taken by the medical officers but the plaintiff was not informed of this by the matron The plaintiff developed puerperal fever and suffered a severe illness. She brought an action against the county council to recover damages for negligence and breach of duty on the part of the council and those for whom they were responsible It was held that she was entitled to recover on the ground that the defendants ought to have known that the home was dangerous and had failed to take reasonable steps to prevent damage to the plaintiff from the danger[4]

5 SOLICITORS

Solicitors are persons of skill and knowledge and like physicians undertake matters of the very highest difficulty and importance. Ordinary neglect where so great a care is demanded becomes very grave

[1] *Hillyer v The Governors of St Bartholomew's Hospital* [1909] 2 K B 820

[2] *Strangways Lesmere v Clayton* [1936] 2 K B 11

[3] *Evans v Mayor etc of Liverpool* [1906] 1 K. B 160

[4] *Lindsey County Council v Mary Marshall* [1937] A. C. 97

A solicitor is liable for the consequences of ignorance or non-observance of the rules of practice of the Court for the want of care in the preparation of the cause for trial or of attendance thereon with his witnesses and for the mismanagement of so much of the conduct of a cause as is usually and ordinarily allotted to his department of the profession.[1]

A solicitor is liable if his client proves negligence operating to produce the loss of the cause,[2] e.g. allowing a claim to be barred by limitation.[3] He is also liable for the negligence of his agent[4] or partner.

Where a solicitor is guilty of negligence or misconduct the Court may order him to make good any loss occasioned by such negligence or misconduct. But, where the loss does not flow from his act or default the Court will not merely because he has been guilty of misconduct mulct him in damages.[6]

Indian law.—An advocate is liable to an action for damages at the suit of his client for a *mala fide* breach of duty or wrong independent of contract.[7]

6 BANKERS

With respect to money placed in their hands by their customers for the ordinary purposes of banking bankers hold themselves out as persons worthy of trust and as persons of skill. They are liable for negligence in paying forged cheques. They are bound to exhibit skill in detecting such forgeries. If a man should lose his cheque book or neglect to search the desk in which it is kept and a servant or stranger should take it up it is impossible to contend that a banker paying his forged cheque would be entitled to charge his customer with that payment.[8]

If the customer by any act of his has induced the banker to act upon the document by his act or neglect of some act usual in the course of dealing between them he will not be permitted to set up his own act or neglect to the prejudice of the banker whom he has thus misled or by neglect permitted to be misled.[9] In *Young* v. *Grote*[10] it was held that negligence on the part of a customer in drawing a cheque disentitled the customer from recovering the extra amount which was paid by the banker owing to the cheque being forged afterwards. This case has been doubted by the Privy Council which laid down that whatever the duty of a customer towards the banker may be with reference to the drawing of cheques the

1 Per Tindal C. J. in *Godefroy* v. *Dalton* (1830) 6 Bing 460, 468.

2 *Godefroy* v. *Jay* (1831) 7 Bing 413; *Floyd* v. *Nangle* (1747) 3 Atk 568.

3 *Fletcher & Son* v. *Jubb Booth & Helliwell* [1920] 1 K. B. 275.

4 *Simmons* v. *Rose*, *Re Ward* (1862) 31 Beav 1.

5 *Norton* v. *Cooper* (1856) 3 S. & G. 375.

6 *Marsh* v. *Joseph* (1896) 13 T. L. R. 136.

7 *Mukdam Shah* v. *Plowden* (1874) P. R. No. 20 of 1874.

8 *Bank of Ireland* v. *Trustees of Evans Charities* (1855) 5 H. L. C. 389; *Coles* v. *The Bank of England* (1839) 10 Ad. & El. 437; *Ahmed Moolla Dawood* v. *Pereman Chetty* (1924) 3 B. L. J. 22.

9 *Scholfield* v. *Earl of Londesborough* [1896] A. C. 514, 523.

10 (1827) 4 Bing 253.

mere fact that the cheque is drawn with spaces such that a forger can utilize them for the purposes of forgery is not by itself any violation of that obligation.[1] But the House of Lords have affirmed its principle by holding that a customer of a bank owes a duty to the bank in drawing a cheque to take reasonable and ordinary precautions against forgery and if as the natural and direct result of the neglect of those precautions the amount of the cheque is increased by forgery the customer must bear the loss as between himself and the banker.[2]

The Calcutta High Court has held that where a banker makes a payment on a forged cheque, he cannot make the customer liable except on the ground of negligence imputable to the customer.[3]

If a banker fails to carry out the instructions of a customer he will be liable for negligence. For instance if he issues bank drafts without authority in accordance with the customer's instructions against valid cheques of the customer owing to the fraud of the customer's servant he will be liable in damages in respect thereof.[4]

One T a solicitor had from a client a power of attorney entitling T to draw cheques on the client's banking account and to apply the moneys for the purposes of his client. T for his own purposes fraudulently drew fifteen cheques on his client's account with the B bank signing the cheques by using a rubber stamp which had on the upper line the name of the client and on the lower line his attorney and by placing his own signature between the lines. T then paid the cheques into his own account with the M bank the defendants, with whom he had an overdraft. On discovering the facts the client brought an action against the defendants for damages for conversion of the cheques. It was held that except in the case of two of the cheques the defendants, in presenting and receiving payment for the cheques had converted them and that as the defendants had from the form of the cheques notice as to the money not being T's money they were negligent in making no inquiry as to T's authority to make these payments into his own account and therefore the action succeeded.[5]

7 MANUFACTURERS

A manufacturer of an article of food medicine or the like sold by

1 *Colonial Bank of Australasia Ltd* v *Marshall* [1906] A. C 559 568 *Imperial Bank of Canada* v *Bank of Hamilton* [1903] A C 49

2 *London Joint Stock Bank* v *Macmillan and Arthur* [1918] A C 777 distinguishing *Scholfield* v *Earl of Londesborough* [1896] A. C. 514 523 (in which Lord Halsbury invited the House to overrule *Young* v *Grote* (1827 4 Bing 253) but four other Lords took a different view) and *Imperial Bank of Canada* v *Bank of Hamilton* on the ground that they were cases of holder and acceptor and not of banker and customer

3 *Bhagwan Das* v *Crest* (1903) 31 Cal 249 distinguishing *Young* v *Grote* (1827) 4 Bing 253 which has created as much diversity of opinion as any case in the books per Lord Macnaghten in *Scholfield* v *Earl of Londesborough* sup See *Punjab National Bank Ltd* v *The Mercantile Bank of India* (1911) 36 Bom. 455 13 Bom. L. R. 835 See *J G Robinson* v *The Central Bank of India Ltd* (1931) 9 Ran 585 where there was want of proper inquiry on the part of collecting bank owing to certain suspicious circumstances.

4 *Bank of Montreal* v *Dominion Gresham Guarantee and Casualty Co* [1930] A. C 659

5 *Midland Bank Limited* v *Reckitt* (1932) 48 T L. R. 271.

him to a distributor in circumstances which prevent the distributor or th ultimate purchaser or consumer from discovering by inspection any defect is under a legal duty to the ultimate purchaser or consumer to take reason able care that the article is free from defect likely to cause injury t health [1] In order to render a manufacturer liable to the ultimate purchaser it is necessary that the article must reach that purchaser in the form i which it leaves the manufacturer without opportunity for intermediat examination A manufacturer will not be liable where the retail deale had an opportunity of inspection and could by a simple test have ascer tained the unsuitability of the goods for the purpose for which they wer sold [2]

The principle laid down in *Donoghue's* case is that there can be no duty cast upon the vendor without proximate relationship of which the main test is whether there is reasonable opportunity for examination be tween the time of the sale or the doing of the work and the use or consumption of the article by the purchaser A builder who builds a house for sale is under no duty either to a future purchaser or to persons who come to live in the house to take care that it is well constructed and safe [3]

The plaintiff drank a bottle of ginger beer manufactured by the defendants which a friend had brought from a retailer and given to her The bottle con tained the decomposed remains of a snail which were not detected until the greater part of the bottle had been consumed The bottle was of dark opaque glass so that the condition of its contents could not be ascertained by inspection The plaintiff suffered from shock and severe gastro-enteritis In a suit by the plaintiff to recover damages it was held that the defendants were liable [4] The plaintiff contracted dermatitis as the result of wearing a woollen garment which when purchased from the retailers was in a defective condition owing to the presence of excess sulphites which it was found had been negligently left in it in the process of manufacture The presence of the deleterious chemical was a hidden and latent defect and could not be detected by any examination that could reasonably be made The garment was made by the manufacturers for the purpose of being worn exactly as it was worn in fact by the plaintiff It was held that there was a duty to take care as between the manufacturers and the plaintiff for the breach of which the manufacturers were liable [5]

Donoghue's case has been distinguished in cases in which the defect o

1 *Donoghue (M'Alister)* v *Stevenson* [1932] A C 562 *Bates* v *Batey & Co* [1913] 3 K B 351 overruled

2 *Kubach* v *Hollands* [1937] 3 All E R 907

3 *Otto* v *Bolton* [1936] 2 K B 46

4 *Donoghue* v *Stevenson* sup

5 *Grant* v *Australian Knitting Mills Ld* [1936] A C 85 See *Evans* v *Triplex Safety Glass Co Ltd* [1936] 1 All E R 283 where the above case was distinguished on the ground that the plaintiff had not proved negligence in the manufacture of glass by the defendant company See *Parker* v *Oloxo Ltd and Senior* [1937] 3 All E R 524 where the manufacturers were held liable for supplying hair dye to a shop-keeper who applied it to the plaintiff who thereby got an acute attack of dermatitis and nervous trouble

the manufacturers is discoverable on reasonable inspection A crane was supplied by manufacturers in parts to be assembled by the purchasers before use and there was a patent and discoverable defect in certain parts which was discovered by an experienced crane erector who erected the crane but who took his chance of operating it without remedying the defect and got killed by the falling of a part of it. In an action by his widow under the Fatal Accidents Act it was held that the defects being discoverable on reasonable inspection and having in fact been discovered by the deceased the manufacturers owed him no duty and were not liable for the accident.[1] A schoolgirl was carrying out a chemical experiment with chemicals supplied by the teacher when an explosion occurred whereby she was severely injured The teacher had purchased the chemicals from the second defendants The second defendants had purchased it from a firm F whose invoice stated that the chemical must be examined and tested by user before use The second defendants had carried out no test and had not advised the teacher that an examination or test would be advisable The second defendants knew that the chemical would be used for school experiments but they had not told F of it. The schoolgirl recovered damages from the second defendants, who sought contribution from F It was held that as F had no notice of the intended user of the chemical and as the second defendants had not carried out any test F was not liable to indemnify the second defendants and that as F could not have been successfully sued by the schoolgirl F was not liable to contribute as joint tortfeasor [2]

Where a higher duty has been undertaken

Where persons possess or use dangerous things they are bound to exercise more than ordinary care in their control of them and in some cases to keep them safe at their peril Of this class are persons keeping—

1 Dangerous animals.
2 Dangerous goods.
3 Gas
4 Machinery

1 DANGEROUS ANIMALS

There are two classes of animals (1) those that are of a dangerous character (animals *feræ naturæ*) and (2) those not of a dangerous nature (animals *mansuetæ naturæ*)

(1) Animals feræ naturæ—If from the experience of mankind a particular class of animals is dangerous though individuals may be tamed a person who keeps one of the class takes the risk of any damage it may do [3] Thus a lion a bear a wolf [4] a monkey [5] and an elephant [6]

[1] *Farr v Butters Bros & Co* [1932] 2 K B 606
[2] *Kubach v Hollands* [1937] 3 All E R. 907
[3] *Filburn v Peoples Palace & Aquarium Co* (1890) 25 Q B D 258 261
[4] Hale P C 420
[5] *May v Burdett* (1846) 9 Q B 101
[6] *Filburn v People's Palace and Aquarium Co* sup *Vedapuratti v Koppan Nair* (1911) 35 Mad 708, *Moung Kyaw v Ma Kyin* (1900) 7 Burma L R 73 in which it was that in this country a man

are regarded as savage animals He who keeps a savage animal does so at his peril He is bound to keep it so far under control as to prevent it indulging its propensity and inflicting injury If the animal escape and hurt any one it is not necessary for the party injured to show that the owner knew the animal to be specially dangerous It is immaterial whether the owner knows it to be dangerous or not

Leading case—MAY v BURDETT

In the leading case the defendant kept a monkey which he knew to be accustomed to bite people and which bit the plaintiff and the defendant was held liable.[1] Denman C J said Whoever keeps an animal accustomed to attack and bite mankind with knowledge that it is so accustomed is *prima facie* liable in an action on the case at the suit of any person attacked and injured by the animal without any averment of negligence or default in the securing or taking care of it. The gist of the action is the keeping of the animal after knowledge of its mischievous propensities The negligence is in keeping such an animal after notice [2]

(2) Animals mansuetæ naturæ—If the animal kept belongs to a class which according to the experience of mankind is not dangerous and not likely to do mischief and if the class is dealt with by mankind on that footing a person may safely keep such an animal unless he knows that the particular animal that he keeps is likely to do mischief [3] The law assumes that animals belonging to this class such as sheep horses oxen dogs etc are not of a dangerous nature and any one who keeps an animal of this kind is not liable for the damage it may do unless he knew that it was dangerous [4] The knowledge of the defendant must be shown as to their propensity to do the act in question It not being usual for dogs,[5]

liable for any damage done by his elephant without any proof of negligence or that he knew it to be of a vicious disposition in view of the manner in and extent to which elephants are employed in this country is not followed by the Madras High Court in the above case

[1] *May v Burdett* (1846) 9 Q B 101

[2] *Ibid* pp 110 112

[3] *Filburn v People's Palace and Aquarium Co* (1890) 25 Q B D 258 261

[4] *Ibid*

[5] *Mason v Keeling* (1699) 12 Mod. 332. In England Magistrates are empowered to protect the public against dogs the Dogs Act 1871 (34 & 35 Vic c. 56) The Dogs Act of 1906 (6 Edw VII c. 32) as amended by the Dogs (Amendment) Act 1928 18 & 19 Geo. V c 5 provides that the owner of a dog shall be liable in damages for injury done to any cattle or poultry by the dog and it shall not be necessary for the person seeking such damages to show a previous mischievous propensity in the dog or the owner's knowledge of such previous propensity or to show that the injury was attributable to neglect on the part of the owner (s. 1) The word cattle in this statute includes horses mules, asses sheep goats and swine Liability for all other kinds of mischief done by dogs remains the same as at common law The word poultry shall have the meaning assigned to it by the Poultry Act 1911 See *Arnell v Paterson* [1931] A C 560 in which it was held that where two dogs belonging to two different owners had attacked a flock of sheep and injured several each owner was responsible for the whole damage

cats,[1] or horses or rams[3] or bulls[4] to attack human beings the plaintiff complaining of such injury from such animals must establish that the defendant knew they were exceptionally savage and prone to injure mankind

A single instance of the ferocity of such an animal towards mankind is sufficient notice.[5] If the owner of a dog appoints a servant to keep it the servants knowledge of the dog s ferocity is the knowledge of the master[6] Where the animal has been found by its owner to possess such a nature it passes into the class of animals which the owner keeps at his peril[7]

The owner of animals of this class is responsible for their trespasses and consequent damage.[8] If a man s cattle, or sheep or poultry stray into his neighbour s land or garden and do such damage as might ordinarily be expected to be done by things of that sort the owner is liable to his neighbour for the consequences[9] But there is a distinction between animals which from their natural tendency to stray and thereby to do real damage require to be and usually are restrained and a dog which is not usually kept confined[10] Owners of dogs and cats[11] are not responsible for their trespass

An owner or occupier of land adjoining an ordinary highway is not bound to fence it so as to prevent harmless animals like sheep[1] or horses[13] from straying upon the highway unless they are known to be of vicious habit For injury caused by horses or cattle to property on or adjoining a highway the owner is not liable in the absence of negligence or of wilful in

[1] *Buckle v Holmes* [1926] 2 K B 125

[2] *Cox v Burbidge* (1863) 13 C B N S 430 *Bradley v Wallaces Ltd* [1913] 3 K B 629 A person is guilty of negligence if he allows an unbroken colt to run loose after a mare on a highway at night *Turner v Coates* [1917] 1 K B 670 *Manton v Brocklebank* [1923] 2 K B 212 Knowledge that a horse has a propensity to bite horses is no evidence of knowledge of a propensity to bite mankind *Glanville v Sutton* [1928] 1 K B 571 The following Indian cases will require reconsideration in the light of the decision in *Manton s* case *Maung Gyi v Maung Po To* (1897 1901) 2 U B R 565 where a mare was killed by a stallion *Maung San v Maung Kyan* (1897 1901) 2 U B R 567 where a buffalo was gored to death by another buffalo *Maung Kyan Dun v Ma Kyin* (1897 1901) 2 U B R 570 *Ngwe Ya v Shwe Ye* (1911) 8 L B R 388 where an elephant was killed by another elephant

[3] *Jackson v Smithson* (1846) 15 M & W 563

[4] *Hudson v Roberts* (1851) 6 Ex 697

[5] *Osborne v Chocqueel* [1896] 2 Q B 109 *Lennon v Fisher* (1923) 25 Bom L R 873

[6] *Baldwin v Casella* (1872) L R 7 Ex 325 But if no special servant is appointed to keep control over the dog the knowledge of any servant of the dog's owner will not be sufficient *Stiles v The Cardiff S N Co* (1861) 33 L J Q B 310

[7] *Krishna Rao v Maroti* [1937] Nag 17 A person who keeps dome tic animals which become animals *ferae naturae* is liable for damage caused by them.

[8] *Cox v Burbidge* (1863) 13 C J N S 430

[9] Per Williams J in [illegible] p 438

[10] Per Willes, J in *ibid* p [illegible]

[11] *Buckle v Holmes* [illegible] 125

[1] *Heath s Garage Ltd v* [illegible] [1916] 2 K B 3[illegible]

[13] *Deen v Davi* [illegible] 282

tention on his part[1] But a person who brings an animal on the high way must take reasonable care to prevent it from doing damage to other persons thereon[2]

Dog—The defendant was held liable for injuries caused by his dog's bite when the dog had been bitten by a mad dog and he had a suspicion of his madness as the dog was kept tied up[3] The defendant was the owner of a dog known by him to be savage A servant of the defendant who was entrusted with the custody of the dog incited it to attack the plaintiff who was a maid servant of the owner of the dog and thereupon the dog flew at and bit the plaintiff It was held that the owner was liable[4] The defendant's dogs which to the knowledge of his servant having the charge of such dogs were likely to bite people without provocation were taken by such servant to a public recreation ground. The plaintiff a child of seven years of age became frightened at the dogs and cried whereupon the dogs attacked and bit him severely The Court allowed the plaintiff Rs. 400 as a *solatium* for the pain and suffering he had undergone and a further sum of Rs. 600 to reimburse his father the expenses incurred in going to Kasauli and in other medical necessities.[5] The plaintiff who went to the defendant's house on a lawful business crossed the verandah and made for the door of the dining room with the object of entering it when a dog which was chained inside the door attacked and bit her The dog when chained and on guard was ferocious and this was known to the defendant The plaintiff sued to recover expenses of treatment and other damages. It was held that the defendant was liable[6]

The defendant parked his saloon motor car in a street and left his dog inside. The dog had always been quiet and docile As the plaintiff was walking past the car the dog which had been barking and jumping about in the car smashed a glass panel and a splinter entered the plaintiff's left eye which had to be removed In an action for damages it was held that the plaintiff could not recover as a motor car with a dog in it was not a thing which was dangerous in itself and as the accident was so unlikely that there was no negligence in not taking precautions against it.[7]

The defendant walking with a dog on a long lead held the lead so loosely that the dog escaped from her control and chased a cat In doing so the lead became entangled with the plaintiff's legs and she was thrown and injured It was held that the defendant was liable because (1) a dog with a long lead loose upon the road was a nuisance and (2) the defendant was negligent in not holding the lead sufficiently firmly[8]

Cat.—The plaintiff accompanied by her husband and carrying a pet dog, entered a tea shop by permission of the defendants the proprietors thereof On the premises was a cat which had kittens. The cat had been shut up in a store-

1 *Gayler and Pope Ltd* v *B Davies & Son Ltd* [1924] 2 K B 75

2 *Deen* v *Davies* [1935] 2 K B 282

3 *Jones* v *Perry* (1796) 2 Esp 482

4 *Baker* v *Snell* [1908] 2 K B 352

5 *Prakash Kumar Mukerji* v *Harvey* (1909) 36 Cal. 1021

6 *Lennon* v *Fisher* (1923) 25 Bom. L. R. 873

7 *Fardon* v *Harcourt Rivington* (1932) 48 T L. R 215

8 *Pitcher* v *Martin* [1937] 3 All E. R 918

room but had escaped. The plaintiff put her dog on the floor. The cat sprang on the dog and bit it. The plaintiff picked up the dog and handed it to her husband. The cat sprang on her and bit her arm. Evidence was given that cats rearing kittens were inclined to be savage and in a vicious state even if gentle otherwise and that if such a cat smelt the clothing of a person who had been carrying a dog it might attack that person. It was held that the defendants were not liable.[1] Where a cat strayed from its owner's land into the land of a neighbour and killed fowls and pigeons kept there it was held that the owner of the cat was not liable.

Horse.—Where a vicious horse was let loose in a field of the defendant which the public were in the habit of crossing and the plaintiff in crossing the field was attacked, bitten and stamped on by the horse, it was held that the plaintiff was entitled to recover damages for the injury caused to him.[3] The male plaintiff hired a horse and landau from the defendant, a livery stable keeper, for the purpose of a drive. The defendant provided the driver as well as the horse and landau. The female plaintiff, the wife of the male plaintiff, was one of the party who went in the landau. During the drive the horse shied at a traction engine and the landau was upset and the plaintiffs were injured. In an action claiming damages in respect of their injuries, it was held that the defendant was liable in damages not only to the male plaintiff but also to the female plaintiff, first, inasmuch as he was, in view of his means of knowledge as to the character of the horse, under a duty to warn not only the person who hired it, but any person he knew or contemplated would use it, and secondly, inasmuch as the defendant who kept control of the landau accepted the female plaintiff as a traveller or passenger and was therefore bound to use due care to see that she was safely carried.[4]

Sheep.—While the plaintiff's motor car was being driven along a highway the driver saw in front of him a number of sheep unattended. He put on his brakes but immediately a sheep jumped from the bank on the near side and ran in front of the car and broke the steering gear in consequence of which the driver lost control and the car ran into the bank and was damaged. It was held that the defendant was under no duty to the plaintiff to keep his sheep from straying upon the highway.[5]

Buffalo.—In a fight between two buffaloes belonging to different owners one was killed. It was held that the owner of the buffalo which killed the other was not liable to make compensation in the absence of neglect or carelessness on his part in keeping the animal.[6]

It has been found desirable specially to modify the common law with respect to injuries inflicted by dogs on cattle and sheep and to dispense with the necessity of proving *scienter*.[7]

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[1] *Clinton* v. *J. Lyons & Co.* [1912] 3 K. B. 198. *Buckle* v. *Holmes* [1926] 2 K. B. 125.

[3] *Lowery* v. *Walker* [1911] A. C. 10. See *Ganda Singh* v. *Chuni Lal Shaha* (1915) 19 C. W. N. 916.

[4] *White* v. *Steadman* [1913] 3 K. B. 340.

[5] *Heath's Garage Ltd.* v. *Hodges* [1916] 2 K. B. 370.

[6] *Mungul Sing* v. *Lehna Sing* (1870) P. R. No. 72 of 1870.

[7] 6 Edw. VII c. 32; 18 & 19 Geo. V c. 21 s. 1.

tention on his part[1] But a person who brings an animal on the highway must take reasonable care to prevent it from doing damage to other persons thereon[2]

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[1] *Gayler and Pope Ltd* v *B Davies & Son Ltd* [1924] 2 K B 75

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[7] *Fardon* v *Harcourt Rivington* (1932) 48 T L. R 215

[8] *Pitcher* v *Martin* [1937] 3 All E R 918

room but had escaped. The plaintiff put her dog on the floor. The cat sprang on the dog and bit it. The plaintiff picked up the dog and handed it to her husband. The cat sprang on her and bit her arm. Evidence was given that cats rearing kittens were inclined to be savage and in a vicious state even if gentle otherwise and that if such a cat smelt the clothing of a person who had been carrying a dog it might attack that person. It was held that the defendants were not liable.[1] Where a cat strayed from its owner's land into the land of a neighbour and killed fowls and pigeons kept there it was held that the owner of the cat was not liable.[2]

Horse.—Where a vicious horse was let loose in a field of the defendant which the public were in the habit of crossing and the plaintiff in crossing the field was attacked, bitten and stamped on by the horse, it was held that the plaintiff was entitled to recover damages for the injury caused to him.[3] The male plaintiff hired a horse and landau from the defendant, a livery stable keeper, for the purpose of a drive. The defendant provided the driver as well as the horse and landau. The female plaintiff, the wife of the male plaintiff, was one of the party who went in the landau. During the drive the horse shied at a traction engine and the landau was upset and the plaintiffs were injured. In an action claiming damages in respect of their injuries it was held that the defendant was liable in damages not only to the male plaintiff but also to the female plaintiff, first inasmuch as he was, in view of his means of knowledge as to the character of the horse, under a duty to warn not only the person who hired it but any person he knew or contemplated would use it, and secondly inasmuch as the defendant who kept control of the landau accepted the female plaintiff as a traveller or passenger and was therefore bound to use due care to see that she was safely carried.[4]

Sheep.—While the plaintiff's motor car was being driven along a highway the driver saw in front of him a number of sheep unattended. He put on his brakes, but immediately a sheep jumped from the bank on the near side and ran in front of the car and broke the steering gear in consequence of which the driver lost control and the car ran into the bank and was damaged. It was held that the defendant was under no duty to the plaintiff to keep his sheep from straying upon the highway.

Buffalo.—In a fight between two buffaloes belonging to different owners one was killed. It was held that the owner of the buffalo which killed the other was not liable to make compensation in the absence of neglect or carelessness on his part in keeping the animal.[6]

It has been found desirable specially to modify the common law with respect to injuries inflicted by dogs on cattle and sheep and to dispense with the necessity of proving *scienter*.[7]

1 *Clinton v. J. Lyons & Co.* [1912] 3 K. B. 198.
Buckle v. Holmes [1926] 2 K. B. 125.
3 *Lowery v. Walker* [1911] A. C. 10. See *Ganda Singh v. Chuni Lal Shaha* (1915) 19 C. W. N. 916.
4 *White v. Steadman* [1913] 3 K. B. 340.
5 *Heath's Garage Ltd. v. Hodges* [1916] 2 K. B. 370.
6 *Mungul Sing v. Lehna Sing* (1870) P. R. No. 72 of 1870.
7 6 Edw. VII c. 32; 18 & 19 Geo. V c. 21 s. 1.

2 DANGEROUS GOODS

In the case of articles dangerous in themselves there is a peculiar duty to take precaution imposed upon those who send forth or install such articles when *it is necessarily the case that other parties will come within* their proximity The duty being to take precaution it is no excuse to say that the accident would not have happened unless some other agency than that of the defendant had intermeddled with the matter If however the proximate cause of the accident is not the negligence of the defendant but the conscious act of another's volition then he will not be liable For against such conscious act of volition no precaution can really avail[1]

Of this class are —

(1) Fire.	(4) Explosive materials.
(2) Fire arms	(5) Poisonous drugs.
(3) Fireworks	(6) Dangerous article

(1) FIRE

Every person who lights a fire is clothed by the common law with a heavy responsibility to his neighbours as regards the lighting safe keeping and spreading of such fire The making of a fire involves the bringing on land of something not naturally there, and therefore the owner of the fire is bound to keep it in at his peril

Domestic purposes—A man is not liable for damage caused by domestic fire that is a fire which began in his house or on his land provided that it originated by accident and without negligence.[2]

Non domestic purposes—In this case a person is absolutely liable for damage caused by fire

When the legislature has sanctioned and authorized the use of a particular thing and it is used for the purpose for which it was authorized and every precaution has been observed to prevent injury the sanction of the legislature carries with it this consequence that if damage results from the use of such thing independently of negligence the party using it is not responsible [3] Thus when the legislature has sanctioned the use of locomotives, there is no liability for injury caused by sparks flowing from them[4] But if there is no such sanction given a railway company will be liable for injury caused by such sparks even though there is no negligence If the railway company had not express statutory power to use

[1] *Dominion Natural Gas Co v Collins* [1909] A. C 610 616

[2] *Tuberuil v Stamp* (1698) 1 Salk 13

[3] Per Cockburn C J in *Vaughan v Taff Vale Ry* (1860) 5 H & N 679 685 *Secretary of State for India in Council v Kali Brahmo Chatterjee* (1928) 33 C. W N 50 The effect of *Vaughan v Taff Vale Ry* is considerably narrowed down by the Railway Fires Act, 1905 5 Edw VII c 11 This Act provides that when damage is caused to agricultural land or crops by fire arising from sparks or cinders emitted from any locomotive engine used on a railway the fact that the engine was used under statutory powers shall not affect liability in an action for such damage (s. 1)

[4] *Ibid*

such engines it is liable for damage by fire proceeding from it though negligence be negatived because it does so at its peril[1]

The Allahabad High Court has ruled that in a suit based on the allegation that the plaintiff's property near a railway line was destroyed by reason of sparks flying from an engine of the defendant railway company the railway company must show that they had taken proper precautions to avoid damage to property adjacent to the railway line[2]

Hayrick on fire—A farmer had a hayrick in a highly dangerous condition It smoked and steamed—unmistakable signs of being about to take fire. To the advice and remonstrance of his neighbours who pointed out its condition all the answer the farmer vouchsafed was that he would change it Finally he did take a kind of precaution he made a chimney through the rick which though done with good intentions was scarcely wise The rick took fire, and burnt the plaintiff's cottage in the next field The farmer was held responsible for the damage[3]

Setting fire to chimney—Where a maid servant, whose business was simply to light a fire took it into her head to clear a chimney of soot by setting it on fire and burnt the whole place down she was held liable[4]

(2) FIRE ARMS

Fire arms which are loaded are highly dangerous things and more than ordinary care is therefore necessary in dealing with or handling them As fire arms are instruments the destructive power of which is obvious to every one the law is very strict in imposing liability for damage done by them The possession of a loaded gun imposes upon the person who is in possession of it an obligation to use a much greater amount of care than would the possession of the same gun were it unloaded[5]

Leading case—DIXON v BELL.

Girl sent for loaded gun—In the leading case the defendant having left a loaded gun with another man sent a young girl to fetch it with a message to the man in whose custody it was to remove the priming which the latter as he thought, did but as it turned out did not do effectually The girl brought it home and thinking that the priming having been removed the gun could not go off pointed it at the plaintiff's son a child and pulled the trigger The gun went off and injured the child. The defendant was held liable.[6]

1 *Jones* v *The Festiniog Ry Co* (1868) L R 3 Q B 733 Where a cottage was destroyed by fire caused by a spark emitted from a steam roller which was found to constitute a nuisance it was held that the difference between the money value of the owner's interest before and after the fire should be the measure of damages and not the cost of rebuilding the cottage *Moss* v *Christchurch Rural Council* [1925] 2 K B 750 *Secretary of State for India* v *Dwarka Prasad* (1927) 49 All 559 *Bombay Baroda Central Railway* v *Dwarka Nath* (1935) 58 All 771 See *Secretary of State for India* v *Sheo bhagwan Chiranjilal* (1935) 58 All 576

3 *Vaughan* v *Menlove* (1837) 4 Scott 244

4 *McKenzie* v *McLeod* (1834) 10 Bing 385

5 *Sullivan* v *Creed* [1904] 2 I R. 317

6 *Dixon* v *Bell* (1816) 5 Man. & S 198

(3) FIREWORKS (4) EXPLOSIVE MATERIALS

Persons are bound to use the very greatest care in the use of fireworks and other highly explosive materials or materials otherwise dangerous or destructive. Owners and controllers of dangerous goods are bound to exercise more than ordinary care, for they have not only taken upon them a matter of business requiring great care but the law having regard for human life and safety demands great care from them. On this principle people sending goods of an explosive or dangerous nature to be carried are bound to give notice of their nature, and if they do not are liable for resulting damage.

Sending nitric acid without warning.—Where the defendant sent nitric acid to a carrier without warning and the carrier's servant handling it as he would handle a vessel of any harmless fluid was injured by its escape the defendant was held liable.[1]

Combustibles.—The defendant sent a box containing combustible and dangerous substances to a railway company without notifying the contents as he was bound by law to do and this box was placed near the place where the plaintiff's husband was at work and it suddenly exploded, and the plaintiff's husband sustained such injuries in consequence that he died from the effects of them. It was held that the defendant was liable for the consequences of the explosion whether it occurred in a manner which he could not have foreseen as probable or not.[2]

Fire works.—Where the defendant stocked fire-works in a room which was let by the plaintiff and fire started in that room and burnt down the plaintiff's goods and premises it was held that the defendant was liable.[3]

Phosphorus.—The defendant, a schoolmaster was held liable to one of his pupils for an injury resulting from the careless act of another boy in handling phosphorus. The phosphorus bottle was locked up and the key kept in the kitchen but some one had got it surreptitiously and left it in the conservatory there it was found by the boys one of them put a lighted match into it and put in the stopper. He afterwards opened it to look at it when the bottle burst and the plaintiff was injured. It was held that the schoolmaster was liable.[4]

Disinfectant powder.—Where the vendor of a tin containing disinfectant powder knew that it was likely to cause danger to a person opening it, unless special care was taken and the danger was not such as presumably would be known to or appreciable by the purchaser unless warned of it it was held that independently of any warranty there was cast upon the vendor a duty to warn the purchaser of the danger.[5]

(5) POISONOUS DRUGS

Persons dealing with poisonous drugs are bound to take more than ordinary care as the mischief which is likely to occur for want of such

[1] *Farrant v. Barnes* (1862) 11 C. B. N. S. 553.
[2] *Lyell v. Ganga Dai* (1875) 1 All. 60 F. B.
[3] *Saliah Mohamed v. Abdul Samad* (1935) 69 M. L. J. 218, 42 L. W. 210, [1935] M. W. N. 805.
[4] *Williams v. Eady* (1893) 10 T. L. R. 41.
[5] *Clarke v. Army and Navy Co-operative Society* [1903] 1 K. B. 155.

care is extremely dangerous to the public A dealer in drugs who carelessly labels a deadly poison as a harmless medicine and sends it so labelled in the market is liable to all persons whether purchaser or not who without fault on their part are injured by using it as medicine in consequence of the false label however many intermediate sales it may have passed through before it reached the hands of the person injured The liability arises out of the duty which the law imposes upon him to avoid acts in their very nature dangerous to the lives of others [1]

Selling belladonna instead of dandelion —The defendant a compounding *chemist put extract of belladonna a poison into a jar labelled Extract of Dandelion* which is a harmless drug and sold it as extract of dandelion to a retail druggist. The latter believing the substance what it purported to be sold it upon a prescription of a physician to the plaintiff The result was serious injury and the defendant was held liable.[2]

Selling injurious hair wash —The defendant a chemist sold a compound which was made of ingredients known only to himself which he represented to be a harmless and beneficial hair wash. The plaintiff bought a bottle for the use of his wife and injury resulted. It was held that the defendant was liable on the ground of negligence in the preparation of the hair wash [3]

(6) DANGEROUS ARTICLE

A person who intentionally induces another to rely on his examination of a dangerous chattel is liable if that other is injured owing to a defect in the chattel which could have been discovered by a proper examination This principle is deducible from *Chapman s* case [4] in which the defendants a firm of stevedores engaged in unloading a ship placed bags of maize in rope slings and then raised them to the deck Here the bags still in the rope slings were turned over to an independent porterage company which transported them to the dock by a crane the defendants gratuitously permitting the porterage company to use the slings A servant of the porterage company was killed when a defective sling which defect could have been discovered by a proper examination broke while the bags were being transported by the porterage company

3 GAS (COAL GAS)

Gas companies are held liable for negligence in respect of gas which is a dangerous substance.[5] They are bound to exercise the greatest care, for they are using a material difficult to manage, and of a very dangerous character for it is explosive and poisonous. Those who carry on operations dangerous to the public are bound to use all reasonable precautions —all the precautions which ordinary reason and experience might suggest

[1] *Thomas v Winchester* (1852) 6 N Y 397 409
[2] *Ibid*
[3] *George v Skivington* (1869) L R. 5 Ex. 1
[4] *Chapman or Oliver v Saddler & Co* [1929] A. C. 584
[5] *Blenkiron v The Great Central Gas Consum Co* (1860) 2 F & F 437 *Dominion Natural Gas Co v Collins* [1909] A. C. 640

to prevent the danger It is not enough that they do what is usual if the course ordinarily pursued is imprudent and careless for no one can claim to be excused for want of care because others are as careless as himself on the other hand in considering what is reasonable it is important to consider what is usually done by persons acting in a similar business [1]

A gas-fitter was employed to repair a gas meter He took it away and supplied a temporary pipe. The plaintiff a servant, in the course of his duty and without any negligence when lighting the gas, was injured by the explosion of the gas which had escaped by reason of the insufficiency of the connecting tube. It was held that the gas fitter was liable [2] The plaintiff a girl of eleven years of age attended a school maintained by the defendants. Whilst she was being instructed in cooking, her apron caught fire from a gas cooker and she received injuries There was no guard round the cooker It was held that the danger was one which ought reasonably to have been anticipated and one which the defendants ought to have taken precautions to prevent by the provision of a guard round the stove or otherwise.[3]

4 MACHINERY

Persons employing machinery are bound to provide reasonably safe machines There are several Acts requiring persons using dangerous machinery to take proper precautions [4]

Intervention of third parties

The wrong doer is answerable for such consequences as are the direct consequences of his wrongful act but the intervention of third parties does not always prevent an injury being traced back to the original wrong doer Damage is recoverable if despite intervening independent causes, the person guilty of the original wrongful act ought reasonably to have anticipated such interventions and to have foreseen that if they occurred the result would be that his wrongful act would lead to mischief [5] In *Lynch v Nurdin* [6] Lord Denman said If I am guilty of negligence in leaving anything dangerous in a place where I know it to be extremely probable that some other person will unjustifiably set it in motion to the injury of a third and if that injury should be so brought about I presume that the sufferer might have redress by action against both or either of the two but unquestionably against the first.

Not far different from the case in which the intervening agent has acted involuntarily is that in which he has acted innocently or with excusable ignorance.

[1] Per Cockburn J in *Blenkiron v The Great Central Gas Consum Co* (1860) 2 F & F 437 440

[2] *Parry v Smith* (1879) 4 C. P D 325

[3] *Fryer v Salford Corporation* [1937] 1 All E R 617

[4] Mines Regulation Act 35 & 36 Vic c. 76 Threshing Machine Act 41 Vic c. 12 Factories Act 41 Vic c. 16 Indian Factories Act (XII of 1911) ss. 18 19 20

[5] *Dominie v Crimsdall* (1937) 106 L. J K B 396 399

[6] (1841) 1 Q B 29 35

A king girl to fetch gun —The defendant, being possessed of a loaded gun sent a young girl to fetch it with directions to take the priming out which was accordingly done and damage accrued to the plaintiff s son in consequence of the girl s presenting the gun at him and drawing the trigger when the gun went off it was held that defendant was liable [1]

Leaving loaded gun at a place where it is likely to be meddled with—Defendant left a gun loaded and at full cock standing inside a fence on his lands, beside a gap from which a private path led over defendant s lands from the public road to his house The defendant s son aged between fifteen and sixteen coming from the road through the gap on his way home found the gun He went back with it to the public road and not knowing that it was loaded pointed it in play at the plaintiff who was on the road. The gun went off and the plaintiff was injured. It was held that the defendant was liable in respect of the injury [2]

Leaving gate open —The plaintiff delivered to the defendant a mare to be agisted in a certain field next to a cricket ground into which the mare escaped through a gate left open by the defendant s servant On the cricketers trying to drive it back in a careful manner the mare injured itself in trying to jump the fence It was held that the damage was the natural consequence of the gate having been left open and that the defendant was liable.[3]

Keeping molten lead on unenclosed land adjacent to highway —Workmen employed by the defendants a gas company for the purpose of carrying out repairs to a gas main in a highway placed a fire pail on which was a ladle containing molten lead on unenclosed land adjacent to the highway The plaintiff a young child was playing with other children near the fire when a passer by accidentally knocked over the fire pail and the molten led was spilled on the plaintiff causing her injury It was held that the defendants were negligent and that they were also liable on the ground that what they were doing was a nuisance in that it was dangerous unless precautions were taken to guard persons using the highway from the danger [4]

Where the intervening agent acts wilfully or negligently there are two wrong-doers and the liability of the one or the other would depend upon the circumstances of each case.

A person lawfully leaving his property unattended in a highway must take reasonable means to prevent such mischief as he ought to contemplate as likely to arise from his user of the highway He is not liable for damage caused by his property through such interference of third persons as he is not bound to anticipate.[5]

Unattended horse and cart struck by passer by —The owner of a horse and cart left them standing in the street without any person to watch them and a passer by struck the animal causing him to back into the plaintiff's window it was held that the owner of the horse was liable.[6]

1 *Dixon* v *Bell* (1816) 5 M & S 198

2 *Sullivan* v *Creed* [1901] 2 I. R. 317

3 *Halestrap* v *Gregory* [1895] 1 Q B 561

4 *Crane* v *South Suburban Gas Co* [1916] 1 K. B. 33

5 *Ruoff* v *Long & Co* [1916] 1 K. B 148

6 *Illidge* v *Goodwin* (1831) C. & P 190

Leaving motor lorry unattended.—The defendants servants momentarily left stationary but unattended in a highway a steam motor lorry Two soldiers seeing the lorry mounted it. One tried but failed to set it in motion. The other succeeded in starting it backwards so that it ran into the plaintiff s shop front and did damage. It was held that there was in the circumstances no evidence of negligence in leaving the lorry unattended and secondly, assuming that there was negligence that there was no evidence that it caused the damage[1]

Passenger giving signal to start tram-car.—While a tram car was at a standstill at a compulsory stopping place, the plaintiff proceeded to enter but as she had put her foot on the step a passenger on the platform rang the conductor s starting bell, and the driver put the tram in motion, with the result that the plaintiff was thrown to the ground and sustained serious injuries. During all this time the conductor was on the top of the car collecting fares. During the earlier part of the same journey the bell had been rung by passengers on at least three occasions. It was held that the tramway company was liable for negligence[2]

Failure to take proper care with gas pipe.—The defendant let to the plaintiff a shop adjoining his house It was arranged that the defendant might enter the shop after the plaintiff had left to see that it was secure. One night a lodger informed the defendant that he smelt gas coming from the shop and the defendant thereupon entered the shop followed by the lodger In the shop a gas-pipe passed down a wall and terminated in a burner The defendant examined the lower part of the pipe with a naked light and the lodger then got upon the counter and examined the upper part of the pipe with a naked light when an explosion occurred which did damage to the plaintiff s goods. It was held that the defendant was liable to the plaintiff for the damage done to her property by the negligent act of the lodger[3]

Where the intervening party is an irresponsible actor the original wrong doer is liable. Children acting in the wantonness of infancy and adults acting on the impulse of personal peril may be and often are only links in a chain of causation extending from such initial negligence to the subsequent injury[4] Any one who invites or gives an opportunity to mischievous children to do a dangerous thing cannot escape liability on the ground that he did not do the wrong[5] In *Lynch* v *Nurdin* Lord Denman said If for example, a game keeper returning from his daily exercise should rear his loaded gun against a wall in the play ground of school boys whom he knew to be in the habit of pointing toys in the shape of guns at one another and one of these should playfully fire it off at a schoolfellow and maim him I think it will not be doubted that the game-keeper must answer in damages to the wounded party[6]

Leaving cart unattended.—The defendant negligently left his horse and cart unattended in the street. The plaintiff a child seven years old got upon

[1] *Ruoff* v *Long & Co* [1916] 1 K B 148

[2] *Steele* v *Belfast Corporation* [1920] 2 I R. 125.

[3] *Brooke* v *Bool* [1928] 2 K B 578

[4] Per Hamilton L. J., in *Lathom* v *Johnson* [1913] 1 K. B 398 413

[5] Per Greer L J in *Haynes* v *Harwood* [1935] 1 K. B. 146 154

[6] (1841) 1 Q B 29 35

the cart in play another child incautiously led the horse on and the plaintiff was thereby thrown down and hurt it was held that the defendant was responsible for the injury [1]

Unhorsed van.—An unhorsed van belonging to the defendants was left by them, unattended in a public street outside their premises. The plaintiff an infant, aged seven years, while playing in the street with other children climbed on to the van, fell and was injured. It was held that the defendants were not liable as there was no inherent danger in a sound stationary and immobile vehicle left unattended in the street.

Contributory negligence

Contributory negligence is negligence in not avoiding the consequence arising from the negligence of some other person when means and opportunity are afforded to do so [3] It is the non exercise by the plaintiff of such ordinary care, diligence and skill as would have avoided the consequences of the defendant s negligence The doctrine of contributory negligence rests upon the view that though the defendant has in fact been negligent yet the plaintiff has by his own carelessness severed the causal connection between the defendant s negligence and the accident which has occurred and that the defendant s negligence accordingly is not the true proximate cause of the injury [4] The doctrine is founded upon the maxim *in jure non remota causa sed proxima spectatur* The law takes into consideration any act or conduct of the party injured or wronged which may have immediately contributed to that result And one who has by his own negligence contributed to the injury of which he complains cannot maintain an action against another in respect of it. For he will be considered in law to be the author of his own wrong But Lord Halsbury is of the opinion that this doctrine is merely a special application of the maxim *in pari delicto potior est conditio defendantis* (where both parties are equally to blame, neither can hold the other liable.)[5]

There are cases in which the negligence of the parties is contemporaneous or so nearly contemporaneous as to make it impossible to say that either could have avoided the consequences of the other's negligence and in which both have contributed to the accident [6] Thus when an accident is caused by the simultaneous negligence of two people neither of whom has time or opportunity to avoid it neither can recover damages.[7]

The doctrine of contributory negligence may be summarized in the

[1] *Lynch v Nurdin* (1841) 1 Q B 29 *Hughes v Macfie* (1863) 2 H & C 744 and *Mangan v Atterton* (1866) L R 1 Ex 239 not good law in view of later authorities, see *Clark v Chambers* (1878) 3 Q B D 327

Donovan v Union Cartage Co [1933] 2 K B 71

[3] *Clayards v Dethick* (1848) 12 Q B 439

[4] Per Bowen L. J in *Thomas v Quartermaine* (1887) 18 Q B D 685 697

[5] See *Wakelin v London & S W Ry Co* (1886) 12 App Cas. 41 45.

[6] *Admiralty Commissioners v Owners of SS Volute* [1922] 1 A C. 129 *Swadling v Cooper* [1931] A. C. 1

[7] *Hayden v M'Quill*[illegible] I R. 87

following propositions —

1 Where the plaintiff himself so far contributes to the misfortune by his own negligence or want of ordinary and common care and caution that but for such negligence or want of ordinary care and caution on his part the misfortune would not have happened he is not entitled to recover[1]

2 Mere negligence or want of ordinary care or caution would not however disentitle the plaintiff to recover unless it is shown—

(1) That he might by the exercise of ordinary care have avoided the consequences of the defendant s negligence If by ordinary care he might have avoided them he is the author of his own wrong[2] Or

(2) That the defendant could not by the exercise of care on his part have avoided the consequences of the neglect or carelessness of the plaintiff[3]

(3) Although the plaintiff is guilty of negligence yet if the defendant could in the result by the use of ordinary care and diligence have avoided the mischief which happened the plaintiff s negligence will not excuse him[4] This principle applies where the defendant, although not committing any negligent act subsequently to the plaintiff s negligence, *has incapacitated himself by his previous negligence from* exercising such care as would have avoided the result of the plaintiff s negligence[5] Where the direct and immediate cause of damage is clearly proved to be the fault of the defendant contributory negligence by the plaintiff cannot be established merely by showing that if the plaintiff had acted in a certain way a different situation would have resulted in which the same mischief might not have occurred[6]

In a running down action if although the plaintiff was negligent the defendant could have avoided the collision by the exercise of reasonable care then it is the defendant s failure to take that reasonable care to which the resulting damage is due and the plaintiff is entitled to recover[7]

(4) If there has been as much want of reasonable care on the plaintiff's part as on the defendant s or in other words if the proximate *cause of the injury is the want of* reasonable care on both sides the

[1] *Tuff* v *Warman* (1858) 5 C B N S. 573 *Young* v *Grote* (1827) 4 Bing 253 *Tart* v *G W Chitty & Co* [1933] 2 K B 453 *Baker* v *E Longhurst & Sons Ld* [1933] 2 K B 461

[2] Per Parke B in *Bridge* v *The Grand Junction Ry Co* (1838) 3 M & W 244 *Davies* v *Mann* (1842) 10 M & W 546 *Butterfield* v *Forrester* (1809) 11 East 60 *Dowell* v *General Steam Navigation Co* (1855) 5 E & B 195 *Neenan* v *Hosford* [1920] 2 I R 258

[3] *Tuff* v *Warman* sup *Radley* v *L & N W Rly* (1876) 1 App Cas 754 759 *H & C Grayson Ltd* v *Ellerman Line Ltd* [1920] A C 466 *Madhava Rau* v *Fernandes* (1894) 17 Mad 368 See *Grand Trunk Ry* v *McAlpine* [1913] A. C 838 846 *Tidy* v *Battman* [1934] 1 K B 319

[4] *Radley* v *L & N W Ry* sup

[5] *British Columbia Electric Ry Co* v *Loach* [1916] 1 A C 719

[6] *Spaight* v *Tedcastle* (1881) 6 App Cas. 217

[7] Per Viscount Hailsham in *Swadling* v *Cooper* [1931] A. C. 1 8 *M Lean* v *Bell* (1932) 48 T L. R. 467

plaintiff cannot sue the defendant. In such a case he cannot with truth say that he has been injured by the defendant's negligence. He can only with truth say that he has been injured by his own carelessness and the defendant's negligence and the two combined give no cause of action at common law[1] The plaintiff is without remedy if the accident is the result of the joint negligence of the plaintiff and of the defendant.[2]

Contributory negligence, to afford a defence, must be that of the plaintiff himself or of his servants whom he has selected from his knowledge or belief in their care or skill the contributory negligence of a third person not being the servant of the plaintiff will not suffice.[3]

The onus of proving affirmatively that there was contributory negligence on the part of the person injured rests in the first instance upon the defendants and that in the absence of evidence tending to that conclusion the plaintiff is not bound to prove its non existence.[4] If the Court finds itself unable to discover to what extent the negligence of the plaintiff or that of the defendant contributed to bring about the accident, the defendant is entitled to succeed for *in pari delicto potior est conditio defendentis*[5]

Rusticum judicium—The doctrine of contributory negligence is not applicable to maritime law Where collision is the result of the negligence of the crew of two vessels the loss is apportioned equally between their owners The rule is limited to cases where both ships are shown to be in fault[6] If the negligent act of one party is such as to cause the other party to make a negligent mistake that he would not otherwise have made then both are equally to blame[7]

Leading cases—TUFF v WARMAN DAVIES v MANN BUTTERFIELD v FORRESTER

Steamer running foul of sailing vessel—In the first leading case an action was instituted against the pilot of a steamer in the Thames for running down the plaintiff's barge and it was proved that there was no look-out on the barge it was held that the defendant was liable.[8]

Tethered donkey hurt on highway—In the second leading case the owner of a donkey fettered his forefeet and in that condition turned it into a narrow lane It was run over by a heavy waggon belonging to the defendant. The waggon was going a little too fast and was not properly looked after by its driver the consequence was that it caught the poor beast which could not get out of the way and killed it The owner of the donkey sued the owner of the waggon and in spite of his own negligence was allowed to recover on the ground

1 Per Lindley L J in *The Bernina* (2) (1887) 12 P D 58 89

Davies v London & S W Ry Co (1883) 12 Q B D 70 *Flower v Adam* (1810) 2 Taunt 314

3 *The Bernina* (2) sup

4 *Wakelin v L & S W Ry* (1887) 12 App Cas 41 47 See *Jones v Great Western Ry Co* (1931) 47 T L R 39

5 *Nani Bala Sen v Auckland Jute Co Ltd* (1925) 52 Cal 602.

6 See *The Rebenfels* (1929) 56 Cal 763 *The Eurymedon* [1938] 1 All E R 122

7 *The Eurymedon* sup

8 *Tuff v Warman* (1857) 2 C B N S 740

that if the driver of the waggon had been decently careful the consequence of plaintiff s negligence would have been averted "Although the ass may h been wrongfully there still the defendant was bound to go along the road at s a pace as would be likely to prevent mischief Were this not so a man m justify the driving over goods left on a public highway or even over a man ly asleep there, or the purposely running against a carriage going on the wrong s of the road.[1]

Putting up pole across road—In the third leading case the defenda for the purpose of making some repairs to his house, had put up a pole acros part of the road a free passage being left by another branch or street in the sa direction The plaintiff was riding home on an evening when there was li enough left to discern the obstruction at 100 yards distance. He went gallop through the streets as fast as his horse could go and in doing so he r against the defendant s obstruction and fell with his horse. He brought an act for damages but his own careless riding was held to be as complete an obsta to his success as the defendant s pole had been to his horse. A party is not cast himself upon an obstruction which has been made by the fault of anoth and avail himself of it, if he do not himself use common and ordinary caut to be in the right One person being in fault will not dispense with anothe using ordinary care for himself "[2]

Negligent management of ill laden car—Some colliery proprietors had siding with an overbridge with a headway of eight feet The railway compa negligently pushed a loaded truck eleven feet high against the bridge and bro it down It appeared that the colliery proprietors as well as the railway compa had been negligent in the matter for they ought to have foreseen what was go to happen as the loaded truck had been standing about some time but in sp of this negligence they were held entitled to recover against the railway compa for the damage done to the bridge as the defendants by the exercise of ordina care might have averted the mischief[3]

Imprudent conduct does not amount to contributory negligence—T plaintiffs who were the legal representatives of one G sued for compensati under Act XIII of 1855 for loss sustained, by the death of the said G which was alleged was caused by injuries received in a railway accident occasioned b the negligence of the defendants servants It was contended that, although G injuries were caused by the negligence of defendants servants the cause of acti was the death of G and that inasmuch as death would probably not have ensu but for the plaintiff s imprudently removing G from the hospital to which he h been taken after the accident, the plaintiffs had been guilty of contributo negligence such as disentitled them to recover compensation. It was held th the cause of action was the wrongful action on the part of defendants servan resulting in injuries which caused the death of G and not the death simply a that therefore the plaintiffs imprudent conduct in removing G from the hospit being subsequent to the negligence which caused the injuries did not constitu contributory negligence or disentitle them to compensation[4]

1 Per Parke B in *Davies* v *Mann* (1842) 10 M & W 546 549

2 Per Lord Ellenborough in *Butterfield* v *Forrester* (1809) 11 East 60 61

3 *Rad'ey* v *L & N W R* (1876) 1 App Cas. 754

4 *Secretary of State* v *Muhamma* (1894) P R No. 85 of 1894

Collision —The owner of a motor car whilst driving the car at about thirty miles an hour along a main road, approached a point in the road where it was crossed by a side road, when a man riding a motor cycle came into the road from the side road without warning and a collision occurred in which the cyclist was killed. The owner of the car applied his brakes but failed to avoid the collision The utmost limit of time between the moment when the owner could have seen the deceased and the moment of impact was not more than a second. In an action by the widow of the deceased it was held that the defendant was not liable as from the moment when the parties became aware of their respective positions there could have been no time for the defendant to do anything to avoid the impact.[1]

Leaving hand on edge of door of railway car —The defendants guard without warning forcibly closed the door of a railway carriage, thereby injuring the plaintiff s hand it was held that the defendants were liable there being no contributory negligence on the plaintiff s part.[2] The plaintiff on entering a railway carriage left his hand on the edge of the door half a minute after so entering, and the guard gave warning before shutting the door It was held that the accident was attributable to his contributory negligence in leaving hi hand carelessly upon a door which he must have known would be immediately shut. But for that fact no accident would have happened[3] The plaintiff was seated in a corner seat in a railway compartment and had his arm resting on the window sill and projecting about four inches out of it. Whilst the train was passing another train standing at a station the plaintiff s arm collided against an open door of the latter train and was fractured In a suit by the plaintiff to recover damages from the railway company it was held that he was not entitled to recover damages for he was guilty of contributory negligence.[4]

Flying open of railway carriage door —The plaintiff in company with his brother was travelling by an underground railway While the train was in motion he got up for the purpose of looking out of the window in order to point out some object to his brother and placed his hand against a bar which went across the carriage window when the door immediately flew open and he fell out and was injured. It was held that he could recover because his act was not a negligent one that is not one which a reasonable man careful of his own safety would not do and that he was justified in assuming that the company's servants had done their duty by fastening the door[5] The door of a railway carriage attached to a train was left open or unfastened. The plaintiff awoke when the

[1] *Swadling v Cooper* [1931] A C 1 Where one ship by gross negligence namely by not carrying any lights, placed another ship in a position of extreme danger and in the moment of emergency the *serang* of the latter gave an order to starboard instead of to port the helm which resulted in a collision it was held that under the circumstances the latter ship was not guilty of such negligence as would make her responsible for the collision *India General Steam Navigation Company v Jagat Chandra Kundu* (1903) 31 Cal. 36

Fordham v L B & S C Ry (1868) L. R 3 C P 368

[3] *Richardson v Metropolitan Ry* (1868) L. R. 3 C. P 374n *Metropolitan Railway Co v Jackson* (1877) 3 App Cas. 193 *Drury v N E Ry* [1901] 2 K B 322. See *Isvar Das v King Emperor* (1921) 1 Pat. 260

[4] *Jehangir v B B & C I Ry Co* (1913) 15 Bom L. R. 252 37 Bom. 575 *Dulabhji v G I P Ry* (1909) 12 Bom. L. R. 73 34 Bom. 427

[5] *Gee v Metropolitan Ry* (1873) 42 L. J Q B 106

train was passing through a tunnel and found that the whole of the door had been torn away from its hinges except the upper part or sunshade which was flapping backwards and forwards against the side of the tunnel and the door post of the carriage In attempting to secure it the top of the plaintiff s finger was torn away and the bone of one of his fingers fractured It was held that the injuries were caused by the negligence of the railway company and that the plaintiff was entitled to recover damages[1] The door of a railway carriage flew open several times of its own accord. There was room in the carriage for the plaintiff to sit away from the door and the train would have stopped in three minutes at a station. In endeavouring to shut it for the fourth time he fell out and was injured it was held that he could not recover[2]

Crossing level crossing without taking care —The defendant railway crossed a public foot way on the level The plaintiff while crossing from the downside to the upside of the railway was knocked down and injured by a train on the up line. The plaintiff stated that before crossing he looked to the right along the down line but he admitted that he did not look to the left along the up line and that if he had looked he must have seen the train coming The driver did not whistle and the gatekeeper gave no warning It was held that the plaintiff s own want of caution was the sole cause of the accident.[3] The deceased was being driven by another man in a waggon called a rig The highway along which the waggon was proceeding crossed the defendants track at a level crossing While the waggon was being driven across the track it was run into by an electric car belonging to the defendants with the result that the deceased was killed. The driver of the electric car saw the waggon in sufficient time to have stopped had his brakes been in order but the car had been sent in the morning with defective brakes It was held in an action brought by the representative of the deceased that though the driver of the waggon and the deceased were guilty of lack of care the railway company was liable because the driver of the car could and ought to have avoided the consequences of that negligence and failed to do so owing to the negligence of their servants in sending out the car with a brake whose inefficiency operated to cause the collision at the last moment.[4]

Deaf person not hearing warning —Deafness of a person crossing a railway line is contributory negligence in him if by reason of that defect he was unable to hear a warning given to him by the company s servants in charge at the crossing[5] A partially deaf man while crossing a thoroughfare was knocked down and injured by the defendants tram car The driver sounded the gong and shouted but did not slacken the peed. The jury found that the plaintiff wa negligent in not keeping a proper look out but that the driver by reasonable care could have avoided the consequences of the plaintiff s negligence It was held that the plaintiff was entitled to damages.[6]

[1] *Bromley* v *G I P Ry* (1899) 1 Bom L R 254 24 Bom 1 See *Adams* v *L & Y Ry* (1869) L R. 4 C P 739 *infra*

Adams v *L & Y Ry* ibid

[3] *Davey* v *L & S W Ry* (1883) 12 Q B D 70

[4] *British Columbia Electric Railway Company Limited* v *Loach* [1916] 1 A C 719

[5] *Skelton* v *L & N W Ry* (1867) 36 L J C P 249 *Stubley* v *L & N W Ry* (1865) L R 1 Ex 13

[6] *Gaffney* v *D W T Co* [1916] 2 I R 472

Passenger entering tram-car from off side—The plaintiff while preparing to mount the defendants tram car which was in motion was knocked down by another tram car coming from the opposite direction whereby he fell between the two trams and his left foot was run over by one of the cars. It was held that the defendants were not liable as the plaintiff attempted to enter the car from the off side although there was no entrance on that side.[1]

Tree damaging post.—A Municipality erected an electrical post near an old cocoanut tree in a dangerous condition standing on the land of the defendant. The Municipality was aware of the condition of the tree but had given no notice for its removal. The tree fell and caused damage to the post. It was held that the defendant was not liable as the cause of the damage was really the contributory negligence on the part of the Municipality in not having taken steps for the removal of the tree

Contributory negligence of children—The rule as to contributory negligence is not inflexibly applied in cases where young children are concerned. Allowance is made for their inexperience and infirmity of judgment.[3] An infant can recover although its conduct contributed to the injury if the defendant is shown to have failed in his duty to the infant.[4] The presence in a frequented place of some object of attraction tempting a child to meddle where he ought to abstain may well constitute a trap and in the case of a child too young to be capable of contributory negligence it may impose full liability on the owner or occupier if he ought as a reasonable man to have anticipated the presence of the child and the attractiveness of the peril of the object.[5] If a child is guilty of what in a grown-up person would be mere negligence and nothing more the child will not be disentitled to relief.[6]

The Madras High Court has held that children capable of discrimination and perceiving danger can be guilty of contributory negligence. In this case a girl of seven years was knocked down by an engine while she was crossing the railway line after passing through a wicket gate. It was held that the proximate cause of the accident was the negligence of the girl in not looking out for a passing engine when she was crossing the line and that as she was capable of appreciating danger and was old enough to have a sense of discrimination she was guilty of contributory negligence.[7]

Leading case—LYNCH v NURDIN

Leaving cart unattended in road—In the leading case the defendant

[1] *J B Nunn v The Calcutta Tramways Company Limited* (1929) 57 Cal 309

Mathuranayagam Pillai v Municipal Council Madura [1937] 1 M L J 125 44 L W 801 [1936] M W N 1373

[3] *Lynch v Nurdin* (1841) 1 Q B 29

[4] *Chizzle v Frost* (1863) 3 F & F 622 *Crocker v Banks* (1888) 4 T L R. 324 *Jewson v Gatti* (1886) 2 T L R. 441

[5] *Latham v Johnson* [1913] 1 K. B 398 416 *Glasgow Corporation v Taylor* [1922] 1 A. C 44

[6] *Hughes v Macfie* (1863) 2 H. & C 744 See *Abbot v Macfie* (1863) 2 H & C. 744

M & S M Railway Co Ltd v Jayammal (1924) 48 Mad. 417

negligently left his horse and cart unattended in the street. The plaintiff a child seven years old got upon the cart in play and the child incautiously led the horse on and the plaintiff was thereby thrown down and hurt it was held that the defendant was responsible for the injury [1]

Leaving rotten fence adjoining highway—The owner of a rotten fence adjoining a highway was held liable to a boy who in attempting to climb it (which he had no right to do) was crushed and otherwise injured [2]

Choice of evils

Where the creation of a dangerous situation is ascribable to the negligent act of the defendant he is not to be excused from liability for consequent harm by reason of the fact that the person endangered loses self possession and in the confusion incident to the danger takes a course which turns out not to be the safest one In such circumstances contributory negligence on the part of the person injured is not made out unless he is shown to have acted with less caution than any person of ordinary prudence would have shown under the same trying conditions [3]

Falling of horse from heap of rubbish—The defendants had made a dangerous trench in the only outlet of a mews putting up no fence and leaving only a narrow passage on which they heaped rubbish The plaintiff a cabman in the exercise of his calling attempted to lead a horse out over the rubbish and the horse fell and was killed it was held that the plaintiff was not disentitled to recover because he had at some hazard created by the defendants, brought his horse out of the stable [4]

Allowing coach to go out with defective coupling—The defendant, a coach proprietor negligently suffered a coach to go out with a defective coupling Going down a hill the coupling broke and the horses became frightened The driver was thereby *compelled to drive to the side of the road* where the coach struck a post and was on the point of being upset. The plaintiff who was riding on the back part of the coach believed himself to be in jeopardy and in order to avoid immediate danger jumped down from the coach and was hurt. As it turned out, he might have avoided harm by remaining on the coach. It was held that the defendant was liable. Lord Ellenborough said To enable the plaintiff to sustain the action it is not necessary that he should have been thrown off the coach it is sufficient if he was placed by the misconduct of the defendant in such a situation as obliged him to adopt the alternative of a dangerous leap or to remain at certain peril. [5]

Springing open of railway carriage door—The plaintiff was travelling in a second class carriage and was sitting close to one side of the carriage looking out He got up walked across to the other side of the carriage and put his hands upon the door which at once sprang open The left hand immediately lost its hold

[1] *Lynch* v *Nurdin* (1841) 1 Q B 29 This case was doubted in *Lygo* v *Newbold* (1854) 9 Ex 302 and *Lay* v *Midland Ry* (1875) 34 L T N S 30

[2] *Harrold* v *Watney* [1898] 2 Q B 320

[3] *Directors etc of North Eastern Ry* v *Wanless* (1874) L R. 7 H L 12 *Chaplin* v *Hawes* (1828) 3 C. & P 511

[4] *Clayards* v *Dethick* (1848) 12 Q B 439

[5] *Jones* v *Boyce* (1816) 1 Stark 493 495

but he grasped the door with his right-hand arm, and hung on to it whilst it was open. He was carried in this way some 300 yards or more, when seeing the pier of an arch over the line ahead of him, and fearful of coming in contact with it, he let go and endeavoured to throw himself across a bush below him; but, not having made allowance for the momentum of the train, missed the bush and fell on the line. He was afterwards found on the ballast much injured. The Court gave judgment in his favour.[1]

Collision between ships.—The defendants, being about to launch a steamship, arranged with the owners of a buoy which was in the line of the launch for its removal. The buoy was removed, but its mooring chains were left unmarked at the bottom of the river. The anchor of the plaintiff's ketch fouled the mooring chains. The master being unable to free the anchor, the defendants sent messages to him warning him that his ketch was in a dangerous position and advising him to slip his anchor and clear away; but the master refused to slip unless the defendants would make themselves answerable for the anchor. The defendants, deeming it dangerous to life and property to postpone the launch and believing the risk of a collision with the ketch to be slight, launched the steamship, and a collision occurred. In an action of damage by collision, brought by the owners of the ketch, it was held that the ketch acted unreasonably and was alone to blame inasmuch as the defendants, in the dilemma in which they were placed by the action of the ketch, rightly chose the lesser of the two risks.[2]

Danger incurred in rescue of third person.

In the United States of America it is established that where by the negligence of A a situation has been created by which B is placed in danger, C is not guilty of contributory negligence in making an effort, such as a reasonable and prudent man would make in such an emergency, to rescue B, although by pursuing that course C places himself in great and obvious danger. The doctrine of voluntary assumption of risk does not apply where the plaintiff has, under an exigency caused by the defendant's wrongful misconduct, consciously and deliberately faced a risk, even of death, to rescue another from imminent danger of personal injury or death, whether the person endangered is one to whom he owes a duty of protection as a member of his family, or is a mere stranger to whom he owes no such special duty.[3] This principle has been recently followed by the Court of Appeal in England.[4] A rescuer who acts on such a moral compulsion that having regard to his powers and his opportunities he would feel disgraced if he merely stood by, he would be entitled to succeed.[5] The impulsive desire to save human life when in peril is one of the most beneficial instincts of humanity.[6]

Rushing in front of train.—The plaintiff's intestate saw a boy standing on a track in imminent danger from an approaching train, which had failed to give

1 *Stokes* v. *Saltonstalt*, 13 Peters 181.
2 *Ketch Frances* v. *The Highland Loch*, [1912] A. C. 312.
3 *Eckert* v. *Long Island Railroad Co.*, 43 N. Y. 502.
4 *Haynes* v. *Harwood*, [1935] 1 K. B. 146, 157.
5 *Scaramanga & Co.* v. *Stamp*, (1880) 5 C. P. D. 295, 304.
6 *Haynes* v. *Harwood*, sup., p. 164.

the statutory signals. To rescue the boy the deceased rushed upon the track immediately in front of the moving train, and in that act was killed. It was held that the deceased was not guilty of contributory negligence, since a dangerous situation had been created by the negligent operation of the train, and the deceased was justified in making effort to save the boy; provided he acted with such care as a prudent person would have shown in such an emergency. The law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless the exposure is clearly rash and reckless.[1]

Injury sustained while rescuing.—While the plaintiffs, husband and wife, were in a shop as customers, a skylight in the roof of the shop was broken, owing to the negligence of contractors engaged in repairing the roof, and a portion of the glass fell and struck the husband, causing him a severe shock. His wife, who was standing close to him, was not touched by the falling glass, but, reasonably believing her husband to be in danger, she instinctively clutched his arm, and tried to pull him from the spot. In doing this she strained her leg in such a way as to bring about a recurrence of thrombosis. In an action to recover damages from the contractors, it was held that the husband was entitled to damages, and that the wife was also entitled to damages, inasmuch as what she did was, in the circumstances, a natural and proper thing to do.[2]

The plaintiff, a police constable, was on duty inside a police station in a street in which were a large number of people, including children. Seeing the defendants' runaway horses with a van attached coming down the street he rushed out and eventually stopped them, sustaining injuries in consequence, in respect of which he claimed damages. It was held that the defendants' servant was guilty of negligence in leaving the horses unattended in a busy street, and that as the defendants must or ought to have contemplated that some one might attempt to stop the horses in an endeavour to prevent injury to life and limb, and as the police were under a general duty to intervene to protect life and property, the act of, and injuries to, the plaintiff were the natural and probable consequences of the defendants' negligence.[3]

Doctrine of identification or imputability.

According to the doctrine of identification, if a person voluntarily engages another person to carry him, he so identifies himself with the carrier as to be precluded from suing a third party for negligence in cases where the carrier is guilty of contributory negligence. "The deceased must be considered as identified with the driver of the omnibus in which he voluntarily became a passenger, and the negligence of the driver was the negligence of the deceased."[4] Thus, although if A is injured by the combined negligence of B and C, A can sue B and C, or either of them, he cannot sue C if he, A, is under the care of B, or in his employ.

This doctrine has been expressly overruled in the case of *The Bernina*,[5]

[1] *Ridley* v. *Mobile, etc., Ry. Co.*, (1905) 86 S. W. Rep 606.

[2] *Brandon* v. *Osborne Garett & Co.*, [1924] 1 K. B. 518.

[3] *Haynes* v. *Harwood*, [1935] 1 K. B. 146.

[4] Per Maule, J., in *Thorogood* v. *Bryan*, (1849) 8 C. B. 115, 131; *Armstrong* v. *Lancashire & Yorkshire Ry.*, (1875) L. R. 10 Ex. 47.

[5] (1888) 13 App. Cas. 1. See *The Drumlanrig*, [1911] A. C. 16.

in which it is laid down that where damage is sustained by the concurrent negligence of two or more persons, there is a right of action against all or any of them at the plaintiff's option, and the exception of contributory negligence extends only to the acts and defaults of the plaintiff himself, or of those who are really his agents. There is, now, no longer any inference of law that the driver of an omnibus, or a coach, or a cab, or the engineer of a train, or the captain of a vessel and their respective passengers, are so far identified as to affect the latter with any liability for the former's contributory negligence.[1] An innocent ship damaged by collision through the fault of two other ships can recover the whole damage from either of the delinquent ships.[2]

Leading case—"THE BERNINA" *or* MILLS *v.* ARMSTRONG.

A collision having occurred between the steamships *Bushire* and *Bernina* through the fault or default of the masters and crews of both, two persons on board the *Bushire*, one of the crew and a passenger, neither of whom had anything to do with the negligent navigation, were drowned. The representatives of the deceased having brought actions against the owners of the *Bernina* for negligence, it was held that the deceased persons were not identified in respect of the negligence with those navigating the *Bushire*, and that the representatives could recover the whole of the damages, the Admiralty rule as to half damages not being applicable to actions under Lord Campbell's Act.[3] Where the drivers of two rival omnibuses were competing for passengers, the one endeavouring to get before the other, and both driving at great speed, and in trying to avoid a cart which got in their way, the wheel of the defendant's omnibus came in contact with the projecting step of the omnibus on which the plaintiff was riding, and caused it to swing against a lamp-post, and the plaintiff was thrown off and injured; it was held that he was not disentitled to recover damages from the proprietor of the rival omnibus, by reason of misconduct on the part of his own driver.[4]

The doctrine of imputability is applied to a case not depending upon the relation of carrier and passenger. The plaintiff, a platelayer of a railway company, was injured by an accident to a trolly caused by some pigs which had strayed from a field belonging to the defendant, through a defective fence, on to the railway line. The railway company were under the obligation of repairing the fence in question, and it was held that, assuming there was negligence in the defendant, the plaintiff could not recover, for he was identified with the company whose line he was using for their purposes, and through whose neglect to erect and maintain a sufficient fence the accident was caused.[5]

Children in the custody of adults.

Persons dealing with an adult, and also with an infant or imbecile of whom the adult has charge, are entitled to expect reasonable care on

[1] *Mathews* v. *London Street Tramways Co.*, (1888) 58 L. J. Q. B. 12.

[2] *The S. S. Devonshire* v. *The Barge Leslie*, [1912] A. C. 634.

[3] *Mills* v. *Armstrong*, "*The Bernina*," (1888) 13 App. Cas. 1; *The Harvest Home*, [1904] P. 409.

[4] *Rigby* v. *Hewitt*, (1850) 5 Ex. 240, 243.

[5] *Child* v. *Hearn*, (1874) L. R. 9 Ex. 176.

the part of the adult, both for himself and for the helpless person in his charge.[1] But the doctrine of identification laid down in this case has been overruled since the decision in *Mills* v. *Armstrong*.[2] In *Waite's* case an infant too young to take care of himself was knocked down in crossing a railway line through lack of proper care on the part of his grandmother and it was held that he was so identified with his grandmother that her negligence was his and he was thus not entitled to recover. Where an infant in charge of his grandfather while crossing the road was injured by the negligent driving of a vehicle, it was held that the contributory negligence of the grandfather was no defence to the infant's claim for damages.[3]

The Bombay High Court has laid down in a case that although the mother of a child might have been guilty of negligence which contributed to the accident, yet if the defendant could, by the exercise of ordinary care and diligence, have avoided the mischief which happened, her negligence would not excuse him.[4]

Breach of statutory duties.

If things authorized to be done by a statute are carelessly or negligently done, an action is maintainable. Such breach is known as "statutory negligence."[5] Powers given by a statute must be exercised reasonably, and not to the prejudice of the public.[6] The breach of a public statute is generally an offence, but where a special damage has been sustained by an individual, or where the statute enacts or prohibits a thing for his particular benefit, he has a remedy by action.[7] Damage resulting from the omissive breach of a statutory duty cannot be recovered unless the damage in question is of a kind which the legislative body had a mind to prevent in enacting the statute.[8]

The defence of *volenti non fit injuria* has no validity against an action based on breach of statutory duty.[9]

1 *Waite* v. *N. E. Ry.*, (1859) E. B. & E. 719

2 (1888) 13 App. Cas. I.

3 *Oliver* v. *Birmingham and Midland Motor Omnibus Co., Ltd.*, [1933] 1 K. B. 35, holding that *Waite's* case has been overruled by *Mills* v. *Armstrong*.

4 *Narayan Jetha* v. *The Municipal Comm. of Bombay*, (1891) 16 Bom. 254.

5 *Lochgelly Iron and Coal Co.* v. *M'Mullan*, [1934] A C. 1, 23.

6 *Manley* v. *St. Helen's Canal & Ry.*, (1858) 2 H. & N. 840; *Ponnusawmy* v. *The Collector of Madura*, (1863) 3 M. H. C. 35. A suit for compensation for wrongful seizure of cattle will lie, the provisions of Act I of 1871 being no bar to such a suit: *Shuttrughon Das Coomar* v. *Hokna Showlal*, (1889) 16 Cal. 159; *Dullabhji* v. *G. I. P. Ry.*, (1909) 12 Bom. L. R. 73. Where a municipality permitted a latrine to be erected by the defendant at a particular spot, which was likely to be a great nuisance to the plaintiff, the Court granted an injunction restraining the defendant from using the spot in question for the purposes of a latrine: *Rama Rao* v. *Martha Sequeira*, (1919) 37 M. L. J. 224.

7 *Couch* v. *Steel*, (1854) 3 El. & Bl. 402; *Boyce* v. *Paddington Borough Council*, [1903] 1 Ch. 109.

8 *Gorris* v. *Scott*, (1874) L. R. 9 Ex. 125; *Secretary of State* v. *Muthuveerama Reddy*, (1910) 34 Mad. 82.

9 *Wheeler* v. *New Merton Board Mills, Ld.*, [1933] 1 K. B. 669; *Baddeley* v. *Granville (Earl)*, (1887) 19 Q. B. D. 423.

There are three classes of cases in which a liability may be established founded upon a statute :—

(1) Where there is a liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law; there, unless the statute contains words which expressly or by necessary implication exclude the common law remedy, the party suing has his election to pursue either that or the statutory remedy.

(2) Where the statute gives the right to sue merely, but provides no particular form of remedy, there the party can only proceed by action at common law.

(3) Where a liability not existing at common law is created by a statute, which at the same time gives a special and particular remedy for enforcing it, the remedy provided by the statute must be followed.[1] But in this case the general scope of the Act and the nature of the statutory duty must be looked at before a proper conclusion can be reached as to whether the Legislature intended the statutory remedy to be the only remedy for the breach of the statutory duty.[2]

The Court will interfere by injunction to restrain acts of public functionaries in excess of their statutory powers.[3]

The right of the private individual to recover is subject to the following limitations :—

(1) He must prove that injury suffered is of a kind which is within the aim and scope of the Act creating such duty, and not merely an accidental result of its breach.[4] He must prove not only the breach, but also that the breach caused the injuries.[5]

(2) Where an Act creates an obligation and enforces the performance in a specified manner it is a general rule that performance cannot be enforced in any other manner. If an obligation is created, but no mode of enforcing its performance is ordained, the common law may in general find a mode suited to the particular nature of the case.[6]

Liability.—Accident at gate of level-crossing.—Where the defendant company neglected to have gates and a watchman at a crossing as required by certain Acts,

[1] Per Willes, J., in *Wolverhampton New Waterworks Co.* v. *Hawkesford*, (1859) 6 C. B. N. S. 336.

[2] *Atkinson* v. *Newcastle & Gateshead Waterworks Co.*, (1877) 2 Ex. D. 441; per Vaughan-Williams, L. J., in *Groves* v. *Lord Wimborne*, [1898] 2 Q. B. 402, 416; per Lord Macnaghten in *Johnstone & Co.* v. *Consumers Gas Co. of Toronto*, [1898] A. C. 447, 451.

[3] *Chabildas Lallubhai* v. *Municipal Commissioner of Bombay*, (1871) 8 B. H. C. (O.C.J.) 85; *Brindabun Chunder Roy* v. *Municipal Commis. of Serampore*, (1873) 19 W. R. 309. See *Stevens* v. *Chown*, [1901] 1 Ch. 894.

[4] *Gorris* v. *Scott*, (1874) L. R. 9 Ex. 125; *Ward* v. *Hobbs*, (1878) 4 App. Cas. 13. See *Municipality of Hubli* v. *Ralli Brothers*, (1911) 13 Bom. L. R. 1138, 35 Bom. 492.

[5] *Grand Trunk Ry. Co.* v. *McAlpine*, [1913] A. C. 838.

[6] *Doe d. Murray, Bishop of Rochester* v. *Bridges*, (1831) 1 B. & Ad. 847, 859; *Pasmore* v. *Oswaldtwistle U. D. C.*, [1898] A. C. 387, 394, 397.

and one day a child was lying on the rails with one foot severed from his body, it was held that the accident to the child was by the company's omission to fence.[1]

Failure to keep sufficient water pressure.—A water company was by statute required to maintain water-pipes with fire plugs charged at a certain pressure to be used in case of fire. The company failed to keep the required pressure, and as a result, so it was alleged, the plaintiff's house, upon catching fire on one occasion, could not be promptly extinguished and was destroyed. It was held that the only remedy contemplated by the statute was the recovery of the penalty provided for in the statute.[2]

Leaving trench open.—The defendant municipality excavated a trench for a pipe drain in a public lane. The trench remained open for some time and owing to a heavy fall of rain, water collected in it, and by percolation or saturation caused a considerable subsidence which resulted in a very heavy damage to the plaintiff's houses, close by the trench. It was held that the keeping of the drain open for a considerable time amounted to negligence and the defendant was liable.[3]

Allowing rain-water to discharge on another's land.—Where a railway company allowed the rain water to flow for some four miles by the sides of their railway line through gutters made up of continuous burrow pits and then allowed it to discharge itself on the lands of the plaintiff, the railway company was held not to have exercised the powers conferred by the Indian Railways Act and was held liable for negligence.[4]

Failure to put light.—An illuminated bollard at one end of a tram refuge had been damaged by an accident. The defendant council had placed a light upon it, but this light had, for some unexplained reason, gone out. As a result of this, the plaintiff's motor car collided with the bollard, and the plaintiff was injured. It was held that the defendant council, having erected the refuge and bollards, were under a continuing duty to keep them adequately lighted, and that they were liable.[5]

Derrick carrying electric current and causing death.—A derrick used in putting up a house was brought into contact with the overhead wires of the respondent company, with the result that a current of electricity was diverted to the street and killed the plaintiff's husband. It was held that the respondents being authorized by an Act in the alternative to place their wires either overhead or underground, were not guilty of negligence in adopting one alternative rather than the other, or in neglecting to insulate or guard the wires in the absence of evidence that such precautions would have been effectual to avert the accident.[6]

Non-liability—Improper arrangements for carrying animals.—The defendant a shipowner, undertook to carry the plaintiff's sheep from a foreign port to England. On the voyage some of them were washed overboard and lost. No other

1 *Williams* v. *G. W. Ry.*, (1874) L. R. 9 Ex. 157.

2 *Atkinson* v. *Newcastle, etc., Waterworks Co.*, (1877) 2 Ex. D. 441.

3 *Vithaldas* v. *Municipal Commissioner of Bombay*, (1902) 4 Bom. L. R. 914. See *Dholka Town Municipality* v. *Desaibhai*, (1913) 15 Bom. L. R. 1031, 38 Bom. 116.

4 *H. H. the Gaekwar* v. *Katchabhai*, (1900) 2 Bom. L. R. 357, 25 Bom. 243 on appeal, (1903) 5 Bom. L. R. 405, 27 Bom. 344, P.C.

5 *Polkinghorn* v. *Lambeth, B. C.*, [1938] 1 All E. R. 339.

6 *Dumphy* v. *Montreal Light, etc., Co*, [1907] A. C. 454.

negligence was alleged than an omission on the part of the defendant to observe certain precautions which had been prescribed by sanitary authorities to prevent the spread of contagious diseases. It was held that the defendant was not liable for the loss of the sheep as no action founded on the breach of statutory duty could be maintained for damage other than that which the statute was intended to guard against.[1]

Insufficient drains.—Where municipal authorities under their statutory powers took over the care of a watercourse and made it into a public drain which proved in course of time to be increasingly insufficient to hold and pass on the mixture of slime and sewage poured into it, with the result that the plaintiff's property was flooded thereby, it was held that they were liable for negligence, notwithstanding that the drain when first formed was sufficient for its purpose.[2]

Damage from engine sparks.—The plaintiff was the owner of a piece of land adjoining a railway line, on which was erected a bungalow with stables and outhouses adjoining. In an action brought by the plaintiff against the railway company to recover compensation for damage occasioned by a fire caused by a spark from one of the engines of the company, the plaint alleged want of due care on the part of the defendants in the management of the line by allowing dry grass of too great a length to remain on the railway banks and in driving their engines along the line without due precaution being taken to prevent the expulsion of sparks. It was held that the defendant company was authorized by statute to run locomotive engines, and, therefore, the company was not liable for damage, without proof of negligence, and that neither in the construction of their engines, nor in the condition of the railway banks, was any negligence shown on the part of the company.[3]

Burden of proof in actions of negligence.

As a rule, the onus of proving negligence is on the plaintiff. He must give some affirmative evidence of negligence in the defendant. The mere proof of the happening of an accident is not, as a general rule, sufficient evidence to support an action.[4] But there may be accidents of such a nature that negligence is presumed from the mere fact of their having happened. The presumption depends upon the nature of the accident.[5]

Where the plaintiff has adduced evidence sufficient to call upon the defendant to reply and the defendant thereupon, being under the burden of

1 *Gorris* v. *Scott*, (1874) L. R. 9 Ex. 125

2 *Mayor* v. *Councillors of Hawthorn* v. *Kannuluik*, [1906] A. C. 105.

3 *Halford* v. *E. I. Ry.*, (1874) 14 Beng. L. R. 1. The judgment of Pontifex, J., in this case, rests upon *Vaughan* v. *The Taff Vale Railway Co.*, (1860) 5 H. & N. 679; but the effect of this latter decision is negatived in England by the Railway Fires Act, 1905, 5 Edw. VII, c. 11, as amended by 13 & 14 Geo. V, c. 27. See *Smith* v. *London, etc., Ry.*, (1870) L. R. 6 C. P. 14, where a company was held liable for negligence in leaving dry heaps of grass near the track and they were ignited by a spark from a passing engine and the fire reached and consumed the plaintiff's cottage; *Bombay Baroda and Central India Railway* v. *Dwarka Nath*, (1935) 58 All. 771.

4 *Hammack* v. *White*, (1862) 11 C. B. N. S. 588, 31 L. J. C. P. 129; *McKenzie* v. *Corporation of Chilliwack*, [1912] A. C. 888; *Cole* v. *De Trafford* (No. 2), [1918] 2 K. B. 523.

5 *D'Souza* v. *Cassamalli Jairajbhoy*, (1933) 35 Bom. L. R. 1007.

laying the material facts before the Court, has refrained from doing so, the onus of proving negligence is discharged by the plaintiff.[1]

To sustain an action for negligence it must be shown that the negligence is the proximate cause of the damage. Where the proximate cause is the malicious act of a third person against which precautions would have been inoperative, the defendant is not liable in the absence of a finding either that he instigated it or that he ought to have foreseen and provided against it.[2]

The plaintiff must prove, where there is no contract, facts inconsistent with due diligence on the defendant's part. But where there is a contract or a personal undertaking, he must prove such contract or personal undertaking and injury to himself.

The ordinary rule in running down cases, that the plaintiff must give affirmative proof of negligence on the part of the defendant or his servant, is subject to the exception that where a vehicle is shown to have been under the management of the defendant or his servant and an accident occurs such as in the ordinary course does not happen, that itself is *prima facie* proof of negligence and the onus rests on the defendant to disprove that the accident arose from want of care.[3] Where injury is caused by negligent driving of a motor car, proof by the plaintiff that the car which caused the accident belonged at the time to the defendant affords *prima facie* evidence that the car was driven either by the defendant or by his servant or agent. The defendant may displace that presumption by proving that the car was not under his control at the time of the accident.[4]

The onus of proving contributory negligence is on the defendant.[5]

Presumption.—Accidents may be of such a nature that negligence may be presumed from the mere fact of the accident, the presumption depending on the nature of the accident.[6] Pulling a wrong rein is evidence of negligence;[7] so too is the spurring of a horse when it is within kicking distance of a passer-by;[8] or the bolting of a horse which has been left un-

1 *Dekhari Tea Co.* v. *Assam-Bengal Ry. Co.*, (1919) 47 Cal. 6.

2 *Rickards* v. *Lothian*, [1913] A. C. 263.

3 *Baijnath Shaw* v. *The Corporation of Calcutta*, (1932) 36 C. W. N. 1147, 1151; *Issac Walton and Company* v. *The Vanguard Motor Bus Company*, (1908) 25 T. L. R. 13.

4 *Liladhar* v. *Harilal*, (1936) 39 Bom. L. R. 44.

5 *Dublin W. Ry.* v. *Slattery*, (1878) 3 App. Cas. 1155, 1169; *Wakelin* v. *L. and S. W. Ry.*, (1886) 12 App. Cas. 41; *Koegler* v. *A. Yule & Co.*, (1870) 14 W. R. (O. C.) 45; *Woodhouse* v. *C. & S. E. Ry.*, (1868) 9 W. R. 73.

6 *Scott* v. *The London Dock Co.*, (1865) 34 L. J. Ex. 220, 3 H. & C. 596; *Byrne* v. *Boadle*, (1863) 2 H. & C. 722, 33 L. J. Ex. 13; *McArthur* v. *Dominion Cartridge Co.*, [1905] A. C. 72; *Choutmull* v. *The Rivers Steam Navign. Co.*, (1897) 24 Cal. 786, (1898) 26 Cal. 398, P. C.; *East Indian Ry. Co.* v. *Kirkwood*, (1919) 48 Cal. 757, P.C.; *Tan Tik Hup* v. *Irrawady Flotilla Co.*, (1901) 7 Burma L. R. 236; *Mulchand Nemi Chand* v. *Basdeo Ram Sarup*, (1926) 48 All. 401.

7 *Wakeman* v. *Robinson*, (1823) 1 Bing. 213.

8 *North* v. *Smith*, (1861) 10 C. B. N. S. 572.

attended in a public street;[1] or the blowing of steam at a level-crossing.[2] The defendant may rebut this presumption if he can. Where damage is caused by an object under the management of the defendant or his servants, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, a presumption arises, in the absence of explanation by the defendant, that the accident was due to negligence: *res ipsa loquitur* (the thing speaks for itself).[3] The maxim *res ipsa loquitur* avoids to some extent the difficulty of proving negligence by the plaintiff when an accident has happened, but the plaintiff cannot shew how it happened. There is a distinction between the case of an accident caused by an inanimate object, such as a bale of goods, and one caused by the misconduct of an animate creature.[4]

In cases where the injury is caused by the use of tackle or machinery for which the defendant is responsible, there is no immediate inference that the defendant is at fault. The plaintiff must prove negligence on the part of the defendant.[5] But if the injury is traced directly to some defect in the tackle or machinery then the defendant must show that the defect was one for which he is not to blame.[6]

Negligence should have connection with the accident.—*Driving on wrong side of road.*—The mere fact of a man driving on the wrong side of a road is no evidence of negligence, in an action brought against him for running over a person who was crossing the road on foot.[7] The plaintiff's wife, having safely crossed in front of an omnibus, was startled by some other carriage, and ran back; the driver had seen her pass, and then turned round to speak to the conductor, so that he did not see her return in time to pull up and avoid mischief. The omnibus was on its right side and going at a moderate pace. Here there was no evidence of negligence on the part of the defendant, the owner of the omnibus. It was held that the owner of the omnibus was not negligent.[8]

Falling of blackboard.—The plaintiff, being a scholar at a school, was injured by the fall of a blackboard that was being used by a teacher in charge of the defendant's class. It was held that the mere fall of the blackboard was not evidence of negligence on the part of the teacher.[9]

Falling of ceiling fan.—The plaintiff, who was a midwife, went to the

[1] *Gayler and Pope, Ld.* v. *B. Davies & Son, Ltd.*, [1924] 2 K. B. 75; *Tolhousen* v. *Davies*, (1888) 57 L. J. Q. B. 392, 394, 58 L. J. Q. B. 98.

[2] *Manchester S. J. Rly.* v. *Fullerton*, (1863) 11 W. R. 754.

[3] *Byrne* v. *Boadle*, (1863) 2 H. & C. 722; *Scott* v. *London Dock Co.*, (1865) 3 H. & C. 596, 601, where an accident results from defective condition of plant, the burden of disproving negligence lies on the person responsible for the defect; *Coughlam* v. *Monks*, [1918] 2 I. R. 306.

[4] See the judgment of Denman, J., in *Manzoni* v. *Douglas*, (1880) 6 Q B. D. 145.

[5] *Macfarlane* v. *Thomson*, (1884) 22 Sc. L. R. 179, followed in *Cates* v. *Mongini Bros.* (1917) 19 Bom. L. R. 778.

[6] *Walker* v. *Oslen*, (1882) 9 R. (Ct. of Sess.) 946, followed in *Cates* v. *Mongini Bros*, ibid.

[7] *Lloyd* v. *Ogleby*, (1859) 5 C. B. N. S. 667.

[8] *Cotton* v. *Wood*, (1860) 8 C. B. N. S. 568.

[9] *Crisp* v. *Thomas*, (1890) 63 L. T. 756. See *Welfare* v. *L. Brighton & S Ry.*, (1869) L. R. 4 Q. B. 693, a zinc roll fell on a person while he looking at a time-table on a rail

restaurant of the defendants to take lunch and sat at a table over which an electric fan was suspended with a rod attached to the ceiling. As the fan was switched off by a waiter under her instructions it fell on her left hand causing injuries to her hand and fingers. The plaintiff brought an action for negligence against the defendants to recover Rs. 15,000 as damages alleging that she was incapacitated from following her profession and was seriously handicapped by being deprived of the use of her left hand and had suffered severe physical and mental pain. It was held that the defendants were not liable as the falling of the fan was not due to any negligence on their part but was due to an accident owing to a latent defect in the metal of the suspension rod, and that the accident could not have been averted by the exercise of ordinary care, skill and caution on the part of the defendants.[1]

Railway cases.—Where the dead body of a man was found on the defendant's line of railway near a level crossing at night, the man having been killed by a train which bore the usual headlights, but did not whistle, or otherwise give warning of its approach. It was held, in an action by his widow, that though *there was no evidence of negligence on the part of the company,* yet there was no evidence to connect such negligence with the accident. In the course of the judgment the Court said: "One may surmise, and it is but surmise and not evidence, that the unfortunate man was knocked down by a passing train while on the level crossing; but assuming in the plaintiff's favour that fact to be established, is there anything to show that the train ran over the man rather than that the man ran against the train?"[2]

Storage of cotton without precaution.—Where the defendants stored a large quantity of cotton bales in a room in the plaintiff's house unwatched for months and cotton ignited with the result that the plaintiff's house was destroyed, it was held that the defendants were liable.[3]

Judge and jury.—According to the English law, it is for the Judge to say whether any facts have been established by evidence from which negligence may be reasonably inferred; and then it is for the jury to say whether, from those facts when submitted to them, negligence ought to be inferred.[4]

Damages.

The amount of damages will depend upon the character of the negligence, as, for instance, if it be of a reckless character.

tion and it was held that there was no evidence of negligence on the part of the defendant company.

[1] *Cates* v. *Mongini Bros.*, (1917) 19 Bom. L. R. 778.

[2] Per Lord Halsbury, L. C., in *Wakelin* v. *L. & S. W. Ry.*, (1886) 12 App. Cas. 41, 45. See *Drury* v. *N. E. Ry.*, [1901] 2 K. B. 322. A mail train from Madras to Bombay passed a certain station and within a minute or two afterwards it was completely wrecked by the falling of a bridge over a watercourse, and the plaintiff's father was one of the many passengers who were then killed either by shock or by drowning in the flood which had carried the bridge away. It was held that the onus of proving that there was no negligence on the part of the railway company in keeping proper watch over the bridge lay on the company: *Madras Ry. Co.* v. *Ratilal Kalidas*, (1905) 4 M. L. T. 251.

[3] *Mulchand Nemi Chand* v. *Basdeo Ram Sarup*, (1926) 48 All. 404.

[4] *Metropolitan Ry. Co.* v. *Jackson*, (1877) 3 App. Cas. 193.

Personal injuries.—With respect to damages for personal injuries, the measure is the loss of time, expenses incurred, pain and suffering, and permanent injury causing pecuniary loss, as to which, it is said, that the amount awarded must not be an equivalent for the loss but some reasonable sum.[1] An injured person can claim damages for the loss of his expectation of life.[2] This right passes to his personal representatives on his death,[3] even though the death is instantaneous owing to the negligent act of the defendant.[4]

Where the plaintiff is disabled for life, the measure of damages is not to be taken from the amount of an annuity which would replace the annual salary of the deceased, for it does not follow that he would have retained his situation for the whole of his life; but a reasonable sum must be given. In awarding damages for a prospective loss of income from professional or other earnings, the jury (or Court) ought not to give the plaintiff such a sum as, if invested, would produce the full amount of income which he would probably have earned, but ought, in estimating the damages, to take into account the accidents of life and other matters, and to give the plaintiff what they consider under all the circumstances a fair compensation for his loss.[5]

The plaintiff was a surgeon of middle age, and previously of robust health, making a professional income of £5,000 a year. The expenses incurred by reason of the accident came to more than £10,000. The injury complained of had rendered his condition helpless and hopeless. It was likely that he would never recover, and certain that he could never resume his practice. Field, J., in charging the jury, divided the claim for damages into the heads of compensation for personal suffering and injury, and for loss of future income. The jury gave a verdict of £7,000, but a new trial was ordered on the ground that the damages were insufficient.[6] The plaintiff met with an accident through the negligence of the defendant and sustained serious personal injuries whereby the expectation

[1] *Armsworth* v. *S. E. Ry.*, (1847) 11 Jur. 758.

[2] *Flint* v. *Lovell*, [1935] 1 K. B. 354, *Roach* v. *Yates*, [1938] 1 K. B. 256.

[3] *Rose* v. *Ford*, [1937] A. C. 826.

[4] *Morgan* v. *Scoulding*, [1938] 1 All E. R. 28.

[5] *Johnstone* v. *Great Western Ry.*, [1904] 2 K. B. 250; *Rowley* v. *L. & N. W. Ry*, (1873) L. R. 8 Ex. 221.

[6] *Phillips* v. *S. W. Ry.*, (1879) 4 Q. B. D. 406, on appeal, *Phillips* v. *London & S. W. Ry.*, (1879) 5 Q. B. D. 78. Where an Aiyangar boy, aged sixteen years, and reading in the third form, was permanently incapacitated by the fall of a temple door due to the negligence of the temple servants and it appeared that his father was very poor and his brothers were not highly educated and consequently held only humble positions in life, it was held that the boy must be taken to be a backward boy and that Rs. 6,000 would be a sufficient compensation under the circumstances for his loss of career as well as his physical sufferings: *Vinayaga* v. *Parthasarathy*, (1918) 7 L. W. 415, 23 M. L. T. 310. The plaintiff while travelling as a passenger in one of the defendants' tram-cars had his leg crushed between that car and another car, belonging to the defendants, the result of the latter's negligence. The Court allowed Rs. 4,000 as a fair compensation for the pain, inconvenience, loss of enjoyment of life, and the actual pecuniary loss caused to the plaintiff: *Sri Ram* v. *Delhi Electric Tram & Lighting Co.*, (1918) P. R. No. 75 of 1919.

of his life was materially shortened. He brought an action to recover damages for the injuries he had sustained. It was held that in assessing damages the judge was entitled to take into consideration as one of the elements of damage the fact that the plaintiff's normal expectation of life had been materially shortened.[1] In a motor car collision a girl aged twenty-three years sustained a fracture of her right leg and thigh. Two days later gangrene set in and the leg was amputated. On the fourth day she died. She was unconscious for nearly all the four days after the accident. Her father, as her administrator, brought an action against the defendant for damages in respect of (1) pain and suffering, (2) the loss of the leg, and (3) the shortening of reasonable expectation of life of the deceased. It was held that he was entitled to recover on all the three heads.[2]

Injury to property.—In such cases the measure of damages is the cost of reinstating the property, or depreciation in the value is the true measure. If a chattel be lost or destroyed through the negligence of the defendant the measure of damages is the value of the chattel, but if the chattel be only injured then the depreciation in its value is the measure, with an extra allowance for the loss of the use of the chattel while it is being repaired or replaced. The measure of damages where goods shipped are lost by fire would be the market value of the goods when and where the goods were damaged less the proceeds of the sale of the damaged goods, and in addition any freight, insurance premia, and other incidental expenditure which may have been lost.[3]

Injury to animal.—In an action for injury to a horse which is sent to a farrier to be cured, the proper measure of damages is the keep of the horse at the farrier's, the farrier's bill, and the loss in value of the horse, but the plaintiff ought not to be allowed also for the hire of another horse during the period of inability of the first horse.[4]

[1] *Flint* v. *Lovell*, [1935] 1 K. B. 354.
[2] *Rose* v. *Ford*, [1937] A. C. 826.
[3] See *Rogers Pyatt Shellac Co.* v. *John King & Co., Ltd.*, (1925) 53 Cal. 239.
[4] *Hughes* v. *Quentin*, (1838) 8 C. & P. 703.

CHAPTER XXI.

NUISANCE.

NUISANCE has been defined to be anything done to the hurt or annoyance of the lands, tenements or hereditament of another, and not amounting to a trespass.[1] The word nuisance is derived from the French word *nuire*, to do hurt or to annoy. Blackstone describes nuisance (*nocumentum*) as something that "worketh hurt, inconvenience, or damage."

A nuisance may be caused by negligence, and there may be cases in which the same act or omission will support an action of either kind, but, generally speaking, these two classes of actions are distinct, and the evidence necessary to support them is different.[2] Nuisance is no branch of the law of negligence, and it is no defence that all reasonable care to prevent it is taken.[3]

Nuisances are of two kinds : (*a*) Public ; and (*b*) Private.

(*a*) Public or common nuisance.—A person is guilty of a public nuisance who does any act, or is guilty of an illegal omission, which causes any common injury, danger or annoyance, to the public or to the people in general who dwell, or occupy property, in the vicinity, or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right.[4]

Public nuisance is an act affecting the public at large, or some considerable portion of them ; and it must interfere with rights which members of the community might otherwise enjoy. Acts which seriously interfere with the health, safety, comfort or convenience of the public generally, or which tend to degrade public morals, have always been considered public nuisances, e.g. carrying on trades which cause offensive smells ;[5] or intolerable noises ;[6] keeping inflammable substance like gun-powder in large quantities ;[7] drawing water in a can from a filthy source.[8] They are dealt with by, or in the name of, the Crown.

Public nuisance can only be the subject of one indictment, otherwise a party might be ruined by a million suits. It depends in a great measure upon the number of houses and the concourse of people in the vicinity. An indictment will fail if the nuisance complained of only affects one or a few individuals. Again, no length of time can legalize a public nuisance, though it may supply a defence to an action by a private person.[9]

1 Stephen, iii, 499.
2 *Cunard* v. *Antifyre Ld.*, [1933] 1 K. B. 551, 558.
3 *Rapier* v. *London Tramways Co.*, [1893] 2 Ch. 588, 599 ; *Newsome* v. *Darton Urban District Council*, [1938] 1 All E. R. 79, 81.
4 Indian Penal Code, s. 268.
5 *Malton Board of Health* v. *Malton Manure Co.*, (1879) 4 Ex. D. 302.
6 *Lambton* v. *Mellish*, [1894] 3 Ch. 163.
7 *R.* v. *Lister*, (1856) 1 D. & B. 118.
8 *Att.-Genl.* v. *Proprietors of Bradford Canal*, (1866) L. R. 2 Eq. 71.
9 *Weld* v. *Hornby*, (1806) 7 East 195. See s. 268 of the Indian Penal

Public nuisance does not create a civil cause of action for any person. In order that an individual may have a private right of action in respect of a public nuisance—

(1) He must show a particular injury to himself beyond that which is suffered by the rest of the public. If the alleged nuisance is, for instance, the obstruction of a highway, it is not enough for him to show that he suffers the same inconvenience in the use of the highway as other people do.[1]

(2) Such injury must be direct, and not a mere consequential, injury; as, where one way is obstructed, but another is left open, in such a case the private and particular injury is not sufficiently direct to give a cause of action.

(3) The injury must be shown to be of a substantial character, not fleeting or evanescent.[2]

Thus, in order to entitle a person to maintain an action for damage caused by that which is a public nuisance, the damage must be particular, direct and substantial.[3]

Under section 91 of the Civil Procedure Code, in the case of a public nuisance the Advocate-General, or two or more persons having obtained the consent in writing of the Advocate-General, may institute a suit, though no special damage has been caused, for a declaration and injunction or for such other relief as may be appropriate to the circumstances of the case.[4]

Leading case.—SOLTAU *v.* DE HELD.

Ringing of bells.—In the leading case the nuisance was regarding noise. The plaintiff resided in a house next to a Roman Catholic chapel of which the defendant was the priest and the chapel bell was rung at all hours of the day and night. It was held that the ringing was a public nuisance and the plaintiff was held entitled to an injunction.[5]

Smoke and noise of cotton mill.—The plaintiffs were owners of a building containing a large number of rooms and had derived a considerable income by

Code as to nuisance punishable as a crime.

1 *Hubert* v. *Groves*, (1794) 1 Esp. 148; *Winterbottom* v. *Lord Derby*, (1867) L. R. 2 Ex. 16; *Vanderpant* v. *Mayfair Hotel Co.*, [1930] 1 Ch. 138. Frontagers on a road not repairable by inhabitants at large have such an interest, over and beyond the general public, in preventing damage to the road, as to entitle them to sue for an injunction: *Medcalf* v. *R. Strawbridge, Ld.*, [1937] 2 K. B. 102; *Bhawan Singh* v. *Narottam Singh*, (1909) 31 All. 444; *Ram Chandra* v. *Joti Prasad*, (1910) 33 All. 287; *Ganga Din* v. *Jagat Tewari*, (1914) 12 A. L. J. R. 1026; *Ramghulam Khatik* v. *Ramkhelawan Ram*, (1936) 16 Pat. 190. In this case it was also held that the right of the resident of a village to sue for removal of an obstruction to a village path or to a well does not amount to a public nuisance and a suit was maintainable without proving special damage.

2 *Benjamin* v. *Storr*, (1874) L. R. 9 C. P. 400, 407; *Sadu* v. *Suka*, (1902) 5 Bom. L. R. 116.

3 *Benjamin* v. *Storr*, sup.

4 See *Advocate-General of Bombay* v. *Haji Ismail Hasham*, (1909) 12 Bom. L. R. 274.

5 *Soltau* v. *De Held*, (1851) 2 Sim. N. S. 133.

letting them. The defendants were owners of an adjacent cotton mill which was erected after the occupation by the plaintiffs of their building. Owing to the noise and smoke of the mill certain rooms in the building remained unlet. In an action against the defendants, the plaintiffs obtained compensation and an injunction prohibiting any increase of smoke, cotton-fluff, or noise of machinery, beyond what subsisted at the time of the decree.[1]

Obstruction of view.—The plaintiff was in possession of a house in London from the windows of which there was an uninterrupted view of part of a certain main thoroughfare along which it was announced that the funeral procession of King Edward VII was to pass. One G agreed to take and pay for seats on the first and second floors of the house in order to see the procession. The defendants caused a stand to be erected across a certain highway to enable the members of the Council and their friends to view the procession. This stand was a public nuisance, and it obstructed the view of the main thoroughfare from the windows of the first floor of the plaintiff's house. G, when he saw the stand in process of erection, asked to be released from his contract as to the seats on the first floor, and the plaintiff, thinking it would be unfair to hold him bound, released him. Several other persons refrained from taking seats owing to the obstruction. In an action by the plaintiff to recover damages for the wrongful interference with the use and enjoyment of her house and the special loss she had sustained, it was held that she was entitled to recover as damages the profit which but for the defendants' act she might have made by letting seats.[2]

(*b*) Private nuisance is the using or authorizing the use of one's property, or of anything under one's control, so as to injuriously affect an owner or occupier of property by physically injuring his property or by interfering materially with his health, comfort or convenience. Private nuisances include acts leading to (*a*) wrongful disturbances of easements or servitudes, e.g. obstruction to light and air, disturbance of right to support; or (*b*) wrongful escape of deleterious substances into another's property, such as smoke, smell, noise, water, filth, electricity, etc.

Private nuisance is an act affecting some particular individual or individuals as distinguished from the public at large. It cannot be made the subject of an indictment, but may be the ground of a civil action for damages or an injunction or both.

A right to commit a private nuisance may be acquired by prescription as an easement.[3] But user which is neither physically capable of prevention by the owner of the servient tenement, nor actionable, cannot support an easement. This is applicable both to the affirmative and negative easement. Thus the right to make a noise so as to annoy a neighbour cannot be supported by user unless during the period of user the noise has amounted to an actionable nuisance.[4]

In an action for nuisance it is no defence that the plaintiff himself

1 *The Land Mortgage Bank of India* v. *Ahmedbhoy Habibbhoy*, (1883) 8 Bom. 35.

2 *Campbell* v. *Mayor, etc., of Paddington*, [1911] 1 K. B. 869.

3 *Leconfield (Lord)* v. *Lonsdale (Earl)*, (1870) L. R. 5 C. P. 657.

4 *Sturges* v. *Bridgman*, (1879) Ch. D. 852; *Murgatroyd* v. *Robir* (1857) 7 El. & Bl. 391.

came to the nuisance;[1] or that the act causing nuisance is beneficial to the public;[2] or the place where the nuisance is created is the only place suitable for the purpose;[3] or that the defendant is merely making a reasonable use of his property.[4]

Highways.—A highway authority is not responsible for mere non-repair of a highway. But if nuisance is created as a result of something which has been done by the highway authority, then liability will arise. "The moment the structure of the road is interfered with, and it comes within the ambit of the operation commenced by the person who is entitled to interfere with the structure of the road, then, until that road is restored into the condition in which it was before that alteration of its structure began, it seems to me the person who interfered with it is responsible for a misfeasance."[5]

A man may become responsible for a nuisance by erecting and working a noisy smith's forge, or noisy workshops;[6] or a stinking tallow furnace;[7] or privy;[8] or by making a cess-pool, the filth of which percolates through the soil and contaminates the water of his neighbour's well or spring;[9] or by keeping a number of vans waiting before a shop door.[10]

A tramway company after a heavy snowstorm cleaned their track by means of a snow-plough, and thereby increased the deposit of snow in certain portions of the street, and, in order to prevent the snow or snow water from freezing in the groves, they scattered salt upon the rails and their vicinity. The snow and salt in combination formed a wet briny amalgam, and the slush thus formed was left to remain in the street without being removed then and there. The result was that the briny slush permeated a large portion of the street and caused a good deal of injury to horses standing or moving there. It was held that these acts of the tramway company amounted to an unauthorized nuisance, and that they were responsible for it, notwithstanding the fact that the duty of removing any obstructions in the street rested with the Town Council as the street authority.[11] A motor omnibus of the defendants, in which the plaintiff was a passenger, "skidded" upon a road the surface of which was greasy from rain, and ran into an electric light standard, and the plaintiff was injured. It was assumed without dispute that motor omnibuses, however well constructed, had a tendency to

1 *Elliotson* v. *Feetham*, (1835) 2 Bing. N. C. 134; *Bliss* v. *Hall*, (1838) 4 Bing. N. C. 183.

2 *Shelfer* v. *City of London Electric Lighting Co.*, [1895] 1 Ch. 287, 316.

3 *St. Helen's Smelting Co.* v. *Tipping*, (1865) 11 H. L. C. 642; *Bamford* v. *Turnley*, (1860) 3 B. & S. 62.

4 *Broder* v. *Saillard*, (1876) 2 Ch. D. 692, 701; *Reinhardt* v. *Mentasti*, (1889) 42 Ch. D. 685

5 Per Lord Halsbury in *Shoreditch Corporation* v. *Bull*, (1904) 90 L. T. 210, 211; *Newsome* v. *Darton Urban District Council*, [1938] 1 All E. R. 79.

6 *Bradley* v. *Gill*, (1682) 125 Eng. Rep. 1, Lutw. 69. See *Sadasiva* v. *Rangappa*, [1918] M. W. N. 293, 24 M. L. T. 17, where an oil mill which was causing noise and foul smell was held to be a nuisance.

7 *Bliss* v. *Hall*, (1838) 5 Scott 500.

8 *Jones* v. *Powell*, (1629) Hutt. 135.

9 *Norton* v. *Scholefield*, (1842) 9 M. & W. 665.

10 *Att.-Genl.* v. *Brighton & Hove Co-oper. Supply Assn.*, [1900] 1 Ch. 276.

11 *Ogston* v. *Aberdeen District Tramways Co.*, [1897] A. C. 111.

skid when the road was greasy. It was held that there was no evidence that the defendants' allowing the motor omnibus to run constituted a nuisance.[1]

Injury caused by subsidence of highway.—The defendants had made a trench in a highway for the purpose of laying a drain. The trench was filled in, but after three years a subsidence occurred at the sight of the excavation. The plaintiff, while riding a bicycle, passed over the subsidence, and was thrown from his machine and injured. It was found that the subsidence was the result of the work, though the work had not been done negligently. It was held that (1) the defendants, having brought a nuisance on the highway, were liable to the plaintiff; (2) that the defendants, being under a duty to make good the inevitable subsidences resulting from the excavation, were also liable on the ground of negligence in not discovering and remedying the danger.[2]

There is a distinction between an action for a nuisance in respect of an act producing a material injury to property, and one brought in respect of an act producing personal discomfort. As to the latter a person must, in the interest of the public generally, submit to the discomfort of the circumstances of the place, and the trades carried on around him; as to the former the same rule would not apply.[3] Lord Westbury, L. C., observed: "in matters of this description it appears to me that it is a very desirable thing to mark the difference between an action brought for a nuisance upon the ground that the alleged nuisance produces material injury to property and an action brought for a nuisance on the ground that the thing alleged to be a nuisance is productive of sensible personal discomfort. With regard to the latter,—namely, the personal inconvenience and interference with one's enjoyment, one's quiet, one's personal freedom, anything that discomposes or injuriously affects the senses or the nerves,—whether that may or may not be denominated a nuisance, must undoubtedly depend greatly on the circumstances of the place where the thing complained of actually occurs. If a man lives in a town, it is necessary that he should subject himself to the consequences of those operations of trade which may be carried on in his immediate locality, which are actually necessary for trade and commerce, and also for the enjoyment of property, and for the benefit of the inhabitants of the town and of the public at large. If a man lives in a street where there are numerous shops, and a shop is opened next door to him, which is carried on in a fair and reasonable way, he has no ground for complaint, because to himself individually there may arise much discomfort from the trade carried on in that shop. But when an occupation is carried on by one person in the neighbourhood of another, and the result of that trade, or occupation, or business, is a material injury to property, then there unquestionably arises a very different consideration . . . in a case of that description, the submission

1 *Wing* v. *London General Omnibus Company*, [1909] 2 K. B. 652. See *McGowan* v. *Stott*, (1923) 143 L. T. 217, where this case is commented on.

2 *Newsome* v. *Darton Urban District Council*, [1938] 1 All E. R. 79.

3 *St. Helen's Smelting Company* v. *Tipping*, (1865) 11 H. L. C. 642.

which is required from persons living in society to that amount of discomfort which may be necessary for the legitimate and free exercise of the trade of their neighbours, would not apply to circumstances the immediate result of which is sensible injury to the value of the property."[1]

Where the plaintiff is seeking to interfere with a great work carried on, so far as the work itself is concerned, in the normal and usual manner the plaintiff must shew substantial and actual damage. "Although when you once establish the fact of actual substantial damage it is quite right and legitimate to have recourse to scientific evidence as to the causes of that damage, still if you are obliged to start with scientific evidence, such as the microscope of the naturalist, or the tests of the chemist, for the purposes of establishing the damage itself, that evidence will not suffice. The damage must be such as can be shown by a plain witness to a plain common juryman.

"The damage must also be substantial, and it must be, in my view, actual; that is to say, the Court has, in dealing with questions of this kind, no right to take into account contingent, prospective, or remote damage. . . . The law does not take notice of the imperceptible accretions to a river bank or to the seashore, although after the lapse of years they become perfectly measureable and ascertainable; and if, in the course of nature, the thing itself is so imperceptible, so slow, and so gradual as to require a great lapse of time before the results are made palpable to the ordinary senses of mankind, the law disregards that kind of imperceptible operation. So, if it were made out that every minute a millionth of a grain of poison were absorbed by a tree, or a millionth of a grain of dust deposited upon a tree, that would not afford a ground for interfering, although after the lapse of a million minutes the grains of poison or the grains of dust could be easily detected.

"It would have been wrong, as it seems to me, for this Court in the reign of *Henry* VI to have interfered with the further use of sea coal in *London*, because it had been ascertained to their satisfaction, or predicted to their satisfaction, that by the reign of Queen *Victoria* both white and red roses would have ceased to bloom in the *Temple Gardens*. If some picturesque haven opens its arms to invite the commerce of the world, it is not for this Court to forbid the embrace, although the fruit of it should be the sights, and sounds and smells of a common seaport and ship-building town, which would drive the Dryads and their masters from their ancient solitudes."[2]

Everything must be looked at from a reasonable point of view; therefore the law does not regard trifling and small inconveniences, but only regards sensible inconveniences, injuries which sensibly diminish the com-

[1] *St. Helen's Smelting Co.* v. *Tipping*, (1865) 11 H. L. C. 642, 650; *Bihari Lal* v. *James Maclean*, (1924) 46 All. 297.

[2] Per James, L. J., in *Salvin* v. *North Brancepeth Coal Co.*, (1874) L. R. 9 Ch. 705, 709.

fort, enjoyment, or value of the property which is affected.[1]

It appears that the degree of harm, in an action for personal discomfort, must be greater than in an action for injury to property. As to the degree of discomfort which constitutes a nuisance, Knight Bruce, V.C., said in *Walter* v. *Selfe* :[2] " Both on principle and authority the important point for decision may . . . be thus put : ought this inconvenience to be considered in fact as more than fanciful, more than one of mere delicacy or fastidiousness, as an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to the elegant or dainty modes and habits of living, but according to plain and sober and simple notions among the English people ? "

Injury to property.

Any nuisance whereby sensible injury is caused to the property of another is actionable.

Trade.—In considering whether any act is a nuisance, regard must be had not only to the thing done, but to the surrounding circumstances. What would be a nuisance in one locality might not be so in another.[3] Thesiger, L. J., said :[4] " Whether anything is a nuisance or not is a question to be determined, not merely by an abstract consideration of the thing itself, but in reference to its circumstances ; what would be a nuisance in *Belgrave Square* would not necessarily be so in *Bermondsey* ; and where a locality is devoted to a particular trade or manufacture, carried on by the traders or manufacturers in a particular and established manner not constituting a public nuisance, . . . the trade or manufacture so carried on in that locality is not a private or actionable wrong.". Where no right by prescription exists to carry on a particular trade, the fact that the locality where it is carried on is one generally employed for the purpose of that and similar trades, will not exempt the person carrying it on from liability to an action for damages in respect of injury created by it to property in the neighbourhood.[5] The grant of the right to carry on a particular trade does not authorize the committal of a nuisance, in the absence of proof that the trade could not be carried on otherwise.[6]

Leading case.—ST. HELEN'S SMELTING CO. *v.* TIPPING.

In the leading case one A had bought an estate in a neighbourhood where many manufacturing works were carried on. Among others there were works of a copper smelting company. It was not proved whether these works were in actual operation when the estate was bought. The vapours from these works, when they were in operation, were proved to be injurious to the trees on A's

[1] Per Lord Wensleydale in *St. Helen's Smelting Co.* v. *Tipping*, (1865) 11 H. L. C. 642, 653 ; *Salvin* v. *North Brancepeth Coal Co.*, (1874) L. R. 9 Ch. 705, 709.

[2] (1851) 4 De G. & S. 315, 322.

[3] *Sturges* v. *Bridgman*, (1879) 11 Ch. D. 852.

[4] *Ibid*, p. 865.

[5] *St. Helen's Smelting Co.* v. *Tipping*, sup.

[6] *Pwllbach Colliery Company Limited* v. *Woodman*, [1915] A. C. 634.

estate. It was held that A was entitled to damages.[1] The plaintiff was the owner of a house and park which adjoined the defendants' gas-works. Immediately adjoining the defendants' premises was a plantation of trees which had been planted by the plaintiff to screen off the gas-works. The fumes and smoke from the gas-works were carried by wind across the plantation and had injuriously affected the trees to such an extent that the tops of some of the trees were dying whilst others were dead. It was held that the plaintiff was entitled to an injunction restraining the defendants from carrying on their works so as to cause injury to the plaintiff's property.[2]

Sewers, drains, etc.—The *prima facie* right of every occupier of a piece of land is to enjoy that land free from all invasion of filth or other matter coming from any artificial structure on land adjoining. He may be bound by prescription or otherwise to receive such matter. Moreover, this right of every occupier of land is an incident of possession, and does not depend on the acts or omissions of other people; it is independent of what they may know or not know of the state of their own property, and independent of the care or want of care which they may take of it.[3]

A person cannot claim a right to foul an ordinary drain by discharging into it what it was not intended to carry off and then throw on other persons an obligation to alter the drain in order to remedy the nuisance that he has produced; nor can he say that any other persons must meanwhile put up with such nuisance.[4]

Physical discomfort.

Acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently done, without subjecting those who do them to an action, e. g. burning weeds, emptying cesspools, making noises during repairs, and other instances which would be nuisances if done wantonly and maliciously. The convenience of such a rule may be indicated by calling it a rule of give and take, live and let live. The above principle will not apply if what has been done was not the using of land in a common and ordinary way, but in an exceptional manner; not unnatural, nor unusual, but not the common and ordinary use of lands. But anything which under any circumstances lessens the comfort or endangers the health or safety of a neighbour is not necessarily an actionable nuisance. Whenever, taking all the circumstances into consideration, including the nature and extent of the plaintiff's enjoyment before the acts

1 (1865) 11 H. L. C. 642.

2 *Wood* v. *Conway Corporation,* (1914) 2 Ch. 47.

3 *Humphries* v. *Cousins,* (1877) 2 C. P. D. 239; *Smith* v. *Kenrick,* (1849) 7 C. B. 515; *Baird* v. *Williamson,* (1863) 15 C. B. N. S. 376; *Broder* v. *Saillard,* (1876) 2 Ch. D. 692; *Hurdman* v. *North Eastern Ry. Co.,* (1878) 3 C. P. D. 168, 173; *Ramasubbier* v. *Mahomed Khan Saheb,* (1937) 46 L. W. 466.

4 *Galstaun* v. *Doonia Lal Seal,* (1905) 32 Cal. 697. In this case the defendant, the owner of a shellac factory, discharged into the municipal drain refuse liquid of an offensive character and he was restrained from doing so as it interfered with the plaintiff's ordinary comfort.

complained of, the annoyance is sufficiently great to amount to a nuisance, an action will lie whatever the locality may be.[1]

The interference with a man's comfort which will justify the intervention of the Courts must be a material interference with an ordinary and reasonable standard of comfort, and must be considered in the light of the circumstances of time and place. It is not necessary that the acts or state of things complained of should be noxious in the sense of being injurious to health. Smoke, noise and offensive odours, although not injurious to health, may constitute a nuisance.[2] But "a man may, without being liable to an action, exercise a lawful trade as that of a butcher, brewer, or the like, notwithstanding it be carried on so near the house of another as to be an annoyance to him in rendering his residence there less delectable or agreeable: provided the trade be so conducted that it does not cause what amounts in point of law to a nuisance to the neighbouring house."[3] Carrying on an offensive trade so as to interfere with another's health and comfort or his occupation of property is a legal nuisance.[4]

Nuisances of this class for the most part arise in respect of—

(1) Obstruction of light.
(2) Pollution of air or water.
(3) Noise.

(1) Light.—With regard to obstruction of light, see Chapter XVI, p. 238 *et seq.*

(2) Air.—If smoke, vapour, and noisome gases are communicated to the air which surrounds and enters the plaintiff's house, so as to cause inconvenience to the occupiers thereof, and render the house manifestly less comfortable, the act will be a nuisance.

In India, voluntarily vitiating the atmosphere so as to make it noxious to the public health is indictable as an offence under s. 278 of the Indian Penal Code.

An injunction was granted to prevent a gas company from manufacturing gas in such close proximity to the premises of the plaintiff, a market gardener, and in such a manner as to injure his garden produce by the escape of noxious

[1] *Bamford* v. *Turnley*, (1862) 31 L. J. Q. B. 286. The defendant kept an hotel adjoining the plaintiff's residence, and put a kitchen stove in a place where no stove had previously been, and so near the wine-cellar of the plaintiff as to damage the wine. It was admitted that the stove was one of an ordinary character, well constructed, and that precaution had been taken to prevent its being obnoxious, but an injunction was granted: *Reinhardt* v. *Mentasti*, (1889) 42 Ch. D. 685. This decision may be supported on the assumption of a finding that the placing for the first time of a large stove against a neighbour's cellar, when it might be placed elsewhere, is not a reasonable user conveniently exercised.

[2] *Crump* v. *Lambert*, (1867) L. R. 3 Eq. 409. If the door of a privy which opens in a public street, is left open and constitutes nuisance, it is actionable: *Krishna Chandra* v. *Gopal Chand*, (1937) 39 P. L. R. 664.

[3] *Bamford* v. *Turnley*, sup. p. 291.

[4] *Galstaun* v. *Doonia Lal*, (1905) 32 Cal. 697; *Sadasiva* v. *Rangappa*, [1918] M. W. N. 293, 24 M. L. T. 17.

matter;[1] to prevent a company from carrying on calcining operations in any manner whereby noxious vapours would be discharged, on the pursuer's land, so as to do damage to his plantations or estate;[2] and to prevent a person from turning a floor underneath a residential flat into a restaurant and thereby causing a nuisance by heat and smell to the occupier of the flat.[3]

Water.—As regards nuisance from pollution of water, see Riparian Rights, Chapter XVI, p. 231, *et seq.*

Pollution of a public spring or reservoir, so as to render it less fit for the purpose for which it is ordinarily used, is a public nuisance, and is punishable as an offence.[4]

(3) Noise.—Quietness and freedom from noise are indispensable to the full and free enjoyment of a dwelling-house. No proprietor has an absolute right to create noises upon his own land, because any right which the law gives is qualified by the condition that it must not be exercised to the nuisance of his neighbours or of the public.[5] Damages were awarded to the proprietor of a hotel for the inconvenience caused by dust and noise in demolition and building operations unreasonably carried on in the neighbourhood by the defendants.[6] As to what amount of noise, or annoyance from noise, will be sufficient to sustain an action, there is no definite legal rule or measure. It is a question of fact in each case, having regard to all the surrounding circumstances. The question so entirely depends on the surrounding circumstances—the place where, the time when, the alleged nuisance, what the mode of committing it, how, and the duration of it, whether temporary or permanent, occasional or continual—as to make it impossible to lay down any rule of law applicable to every case.[7] Noise will create an actionable nuisance only if it materially interferes with the ordinary comfort of life, judged by ordinary plain and simple notions, and having regard to the locality; the question being one of degree in each case.[8] The standard of judging it is according to that of men of ordinary habits, and not of men of fastidious tastes or of over-sensitive nature, whether due to religious sentiment or not.[9] In *Colt's* case, Earl of Halsbury said: "A dweller in towns cannot expect to have as pure air, as free from smoke, smell and noise as if he lived in the country, and distant from other dwellings, and yet an excess of smoke, smell, and noise may give a cause of action, but in each of such cases it becomes a question of degree, and the question is in each case whether it amounts to a nuisance which will give

[1] *Broadbent* v. *Imperial Gas Co.*, (1856) 7 De G. M. & G. 436.

[2] *Shotts Iron Co.* v. *Inglis*, (1882) 7 App. Cas. 518.

[3] *Saunders Clark* v. *Grosvenor Mansions Co.*, (1900) 16 T. L. R. 428.

[4] See the Indian Penal Code, s. 277.

[5] *Allen* v. *Flood*, [1898] A. C. 1, 101; *Shaik Ismail Sahib* v. *Venkatanarasimhulu Iyah*, [1937] Mad. 51.

[6] *Andreae* v. *Selfridge & Co.*, [1938] 1 Ch. 1.

[7] *Bamford* v. *Turnley*, (1860) 3 B. & S. 62, 72.

[8] *Vanderpant* v. *Mayfair Hotel Co.*, [1930] 1 Ch. 138.

[9] *Muhammad Jalil Khan* v. *Ram Nath Katna*, (1930) 53 All. 481. See *Janki Prasad* v. *Karamat Husain*, (1931) 53 All. 836, where the question whether music in a temple amounts to

a right of action."[1]

A person living in a district specially devoted to a particular trade cannot complain of any nuisance by noise caused by the carrying on of any branch of that trade without carelessness and in a reasonable manner. A resident in such a neighbourhood must put up with a certain amount of noise. The standard of comfort differs according to the situation of property and the class of people who inhabit it.[2] To give a householder a right of injunction against a neighbour for carrying on a noisy business in a trade district, the noise must amount to a nuisance, regard being had to the nature and habits of the neighbourhood and to the pre-existing noises.[3] In a locality devoted to noisy trades, such as the printing and allied trades, if a printing house or factory subjects the occupier of an adjoining residence to such an increase of noise as to interfere substantially with the ordinary comfort of human existence according to the standard of comfort prevailing in that locality, that is sufficient to constitute an actionable wrong entitling the occupier to an injunction.[4]

In considering the rights of the parties, it is immaterial whether the persons whose actions are objected to have come recently to the neighbourhood, or have been occupying the place for a long time.[5]

A prescriptive right to the exercise of a noisome trade on a particular spot may be established by showing twenty years' user by the defendant.[6]

Noise.—The constant daily ringing of a peal of heavy bells in a house actually adjoining a private residence was held to be an actionable nuisance and an injunction was granted to restrain it.[7] Injunction was granted to prevent building operations from being proceeded with during the night to the annoyance and discomfort of an adjoining occupier.[8] Sending up of fireworks and causing

a private nuisance is discussed at length.

1 *Colls* v. *Home and Colonial Stores Ltd.*, [1904] A. C. 179, 185. See *Hari* v. *Vithal*, (1905) 8 Bom. L. R. 89, 31 Bom. 560, where some coppersmiths were restrained from carrying on their *kirtans* in a way so as to cause disturbance to the conducting of *bhajans* (hymns) in a temple. See *Ismail Sahib* v. *Venkatanarasimhulu*, [1937] Mad. 51, where during the performance of a ceremony noise was produced by tomtom cymbals, etc. long after the hour when people would ordinarily go to sleep and it was held that this amounted to a nuisance.

2 *Rushmer* v. *Polsue & Alfieri, Ltd.*, [1906] 1 Ch. 234, 250. See *Ball* v. *Ray*, (1873) L. R. 8 Ch. 467, where the principles applying to a person who turns his house to unusual purpose are discussed.

3 *Polsue & Alfieri Ltd.*, v. *Rushmer*, [1907] A. C. 121.

4 *Ibid.*

5 *Janki Prasad* v. *Karamat Husain*, (1931) 53 All. 836.

6 *Elliotson* v. *Feetham*, (1835) 2 Bing. N. C. 134; *Flight* v. *Thomas*, (1839) 10 A. & E. 590. See *Goldsmid* v. *Tunbridge Wells Improvement Commissioners*, (1865) L. R. 1 Eq. 161, where it was held that no prescriptive right could be obtained to discharge sewage into a stream passing through plaintiff's land and feeding a lake therein in perceptibly increasing quantity. No right to hold *kirtan* upon another's land can be acquired as an easement. Such a right may be acquired by custom: *Mohini Mohan* v. *Kashinath Roy*, (1909) 13 C. W. N. 1002.

7 *Soltau* v. *De Held*, (1851) 2 Sim. N. S. 133.

8 *Webb* v. *Barker*, [1881] W. N. 158.

a band to play for several hours twice a week within one hundred yards of a dwelling-house;[1] the performance of a circus erected near the plaintiff's house, making a loud noise heard through the plaintiff's house;[2] the collection of crowds outside a club established for pugilistic encounters;[3] the establishment of a rifle gallery, organ, and roundabout, in proximity to the plaintiff's house;[4] erection of a stable in such a close proximity to a house as to interfere by reason of the noise of the horses with the enjoyment of the owner of the house;[5] noise from the kitchen of an hotel erected close to plaintiff's residence,[6] were restrained by injunction.

The plaintiffs carried on the business of breeding silver foxes on their land. During the breeding season the vixens are very nervous, and liable if disturbed either to refuse to breed, to miscarry, or to kill their young. The defendant, an adjoining landowner, maliciously caused his son to discharge guns on his own land as near as possible to the breeding pens for the purpose of injuring the plaintiffs. It was held that the plaintiffs were entitled to an injunction and damages, although the firing took place on the defendant's land, over which he was entitled to shoot.[7]

Music.—Where a nuisance was caused to a tenant of a room in a house by reason of the floor above being used for dancing and other entertainments causing noise and vibration, the Court gave nominal damages but declined to grant an injunction on the ground of balance of convenience.[8] Giving of numerous music lessons by the defendant in a house separated from the plaintiff's house by a thin party-wall, varied by practising and singing, and evening musical entertainments, was held not to be a nuisance for which an injunction could be granted; and, moreover, the Court restrained the plaintiff from making noises by way of reprisal.[9] Similarly, perpetual injunction was granted where the defendants disturbed the plaintiffs while calling at the Azan prayer in their mosque by blowing conches and beating drums.[10]

Prescription.—A confectioner had upwards of twenty years used, for the purposes of his business, a pestle and mortar in his back premises, which abutted on the garden of a physician, and the noise and vibration were not felt to be a nuisance or complained of until 1873, when the physician erected a consulting room at the end of his garden, and then the noise and vibration, owing to the in-

1 *Walker* v. *Brewster*, (1867) L. R. 5 Eq. 25.

2 *Inchbald* v. *Robinson*, (1869) L. R. 4 Ch. 388.

3 *Bellamy* v. *Wells*, (1890) 60 L. J. Ch. 156.

4 *Winter* v. *Baker*, (1887) 3 T. L. R. 569.

5 *Ball* v. *Ray*, (1873) L. R. 8 Ch. 467; *Broder* v. *Saillard*, (1876) 2 Ch. D. 692.

6 *Vanderpant* v. *Mayfair Hotel Co.*, [1930] 1 Ch. 138.

7 *Hollywood Silver Fox Farm, Ld.* v. *Emmett*, [1936] 2 K. B. 468.

8 *Jenkins* v. *Jackson*, (1888) 40 Ch. D. 71. But where the proprietors of an hotel applied for an injunction to restrain the proprietor of tea rooms and a restaurant on the opposite side of the street, from using his premises for the purpose of music, dancing, or other entertainments, so as to cause a nuisance to the plaintiffs, their servants and guests, the Court granted a limited injunction restraining the defendant from causing a nuisance by keeping the windows open after midnight while the music and dancing were going on: *The New Imperial & Windsor Hotel Co.* v. *Johnson*, [1912] 1 I. R. 327.

9 *Christie* v. *Davey*, [1893] 1 Ch. 316.

10 *Jawand Singh* v. *Muhammad Din*, (1919) P. W. R. No. 89 of 1920.

creased proximity, became a nuisance to him. The question for the consideration of the Court was whether the confectioner had obtained a prescriptive right to make the noise in question. It was held that he had not, inasmuch as the user was not physically capable of prevention by the owner of the servient tenement, and was not actionable until the date when it became by reason of the increased proximity a nuisance in law, and under these conditions, as the latter had no power of prevention, there was no prescription by the consent or acquiescence of the owner of the servient tenement.[1]

Who can sue for nuisance.

The actual occupier of premises can alone bring an action for nuisances of a temporary character. If the injured property is in the occupation of tenants, the landlord or reversioner has no right of action. The latter can only bring an action if the injury complained of is of a permanent nature[2] (*e.g.* obstruction of light, but not such as noise of machinery in adjacent premises[3]) and injurious to the property and detrimental to the letting value of the house.[4]

If a person takes as tenant an unfurnished house, he cannot, in the absence of a warranty or other special circumstances, hold the landlord liable because of damage arising to him during and by reason of his occupancy as tenant through the house being out of repair or dilapidated. If the tenant brings his wife with him to live in the house, she cannot be in a better position than her husband by reason of her occupancy of the house.[5] A person who has no interest in the property, no right of occupation in the proper sense of the term, cannot maintain an action for a nuisance. The wife of a tenant, was held not entitled to maintain an action for injury caused by a tank falling on her owing to vibrations caused by the defendant.[6]

Who is liable for nuisance.

The action must be brought "against the hand committing the injury, or against the owner for whom the act was done."[7] It will lie against the person (1) who creates or continues a nuisance or authorizes or suffers the creation of a nuisance; or (2) who lets or sells property with a nuisance on it. A person is liable for a nuisance constituted by the state of his property: (1) if he causes it; (2) if by the neglect of some duty he

1 *Sturges* v. *Bridgman*, (1879) 11 Ch. D. 852.

2 *Mumford* v. *O. W. & W. Ry.*, (1856) 1 H. & N. 34. In this case it was held that a reversioner could not maintain an action against a railway company for making hammering noises in a shed adjoining his house by reason whereof the tenant quitted, and he was unable to let the house except at a lower rent. See *Mott* v. *Shoolbred*, (1875) L. R. 20 Eq. 22, where a public street was improperly used as a stable yard.

3 *Jones* v. *Chappell*, (1875) L. R. 20 Eq. 539; *Cooper* v. *Crabtree*, (1882) 20 Ch. D. 589.

4 *Alwar Chetty* v. *Madras Electric Supply Corporation, Ltd.*, (1932) 56 Mad. 289.

5 *Cavalier* v. *Pope*, [1905] 2 K. B. 757.

6 *Malone* v. *Laskey*, [1907] 2 K. B. 141.

7 Per Lord Kenyon in *Stone* v. *Cartwright*, (1795) 6 T. R. 411, 412; *Wilson* v. *Peto*, (1821) 6 Moore 47.

allowed it to arise; and (3) if, when it has arisen without his own act or default, he omits to remedy it within a reasonable time after he did or ought to have become aware of it.[1]

A landowner, however, is not liable for a nuisance caused by something done by another person against his will, subject to the qualification that he may become liable if he permits it to continue and fails to abate it within a reasonable time after it has come, or ought to have come, to his knowledge.[2]

The acts of two or more persons may, taken together, constitute such a nuisance that the Court will restrain all from doing the acts constituting the nuisance although the annoyance occasioned by the act of any one of them, if taken alone, would not amount to a nuisance. For instance, if one person leaves a wheelbarrow standing on a way, that may cause no appreciable inconvenience, but if a hundred do so that may cause a serious inconvenience, which a person entitled to the use of the way has a right to prevent, and it is no defence to any one person among the hundred to say that what he does causes of itself no damage to the complainant.[3]

Liability of landlord and tenant.—Generally no action will lie against a landlord for any nuisance existing on premises in occupation of a tenant. The action should be brought against the tenant.[4]

The owner of dilapidated premises may demise them as they are.[5] A landlord who lets an unfurnished house in a dangerous condition, he being under no liability to keep it in repair, is not liable in the absence of express contract to his tenant, or to a person using the premises, for personal injuries happening during the term, and due to the defective state of the house.[6] The landlord is not liable even if the defects are due to his construction or are within his knowledge.[7] The only duty which the landlord owes to the customers or guests of the tenant is not to expose them to a concealed danger or trap.[8] If there is a defect in the premises likely to cause injury, but known both to the landlord and the tenant, the landlord is not responsible for injuries caused to the tenant.[9]

The landlord will be liable for nuisance (1) if he lets the premises in a

1 *Noble* v. *Harrison*, [1926] 2 K. B. 332, 338.

2 *Barker* v. *Herbert*, [1911] 2 K. B. 633, 645.

3 *Lambton* v. *Mellish*, [1894] 3 Ch. 163. In *Jawand Singh* v. *Muhammad Din*, (1919) P. W. R. No. 89 of 1920, the defendants, Hindus, were prevented from blowing conches and beating drums when the plaintiffs, Mahomedans, called out the *azan* from a mosque.

4 *R.* v. *Pedley*, (1834) 1 Ad. & E. 822; *Rich* v. *Basterfield*, (1847) 4 C. B. 783; *Pretty* v. *Bickmore*, (1873) L. R. 8 C. P. 401.

5 *Cavalier* v. *Pope*, [1906] A. C. 428.

6 *Lane* v. *Cox*, [1897] 1 Q. B. 415; *Cavalier* v. *Pope*, sup.; *Dobson* v. *Horsley*, [1915] 1 K. B. 634.

7 *Bottomley* v. *Bannister*, [1932] 1 K. B. 458; *Otto* v. *Bolton*, [1936] 2 K. B. 46.

8 *Fairman* v. *Perpetual Investment Building Society*, [1923] A. C. 74, overruling *Miller* v. *Hancock*, [1893] 2 Q. B. 177.

9 *Lucy* v. *Bawden*, [1914] 2 K. B. 318.

ruinous condition, provided that he knew of their condition;[1] (2) when it has been created before the premises were let by him,[2] e.g. obstruction caused to the ancient lights of a neighbour; (3) if he expressly or impliedly authorises his tenant to create or continue the nuisance;[3] (4) when the nuisance is due to a breach by him of the covenants of the lease,[4] e.g. if he neglects to repair the premises.

The defendant was the owner of a vacant house in a street, with an area which adjoined the highway. One of the rails of the area railings had been broken away by boys playing football in the street, and, consequently, a gap had been created in the railings. The plaintiff, a child, got through this gap from the street, and was clambering along inside the railings, when he fell into the area and sustained injuries through the fall. The defendant did not know that the rail had been removed and such a time had not elapsed after its removal that he would have known of it if he had used reasonable care. In an action brought to recover damages for the injuries sustained by the plaintiff, it was held that the defendant was not liable in respect of the nuisance created upon his premises by the action of trespassers.[5] The owner of a dilapidated house contracted with his tenant to repair it but failed to do so. The tenant's wife, who lived in the house and was well aware of the danger, was injured by an accident caused by the want of repair. It was held that the wife, being a stranger to the contract, had no claim for damages against the owner.[6]

The plaintiff was walking along a highway when she suffered personal injury by the fall of a defective shutter from a house abutting on the highway. The house was let to a tenant and the landlord was under no contractual liability to the tenant to repair but had reserved the right to repair. In an action against the tenant and the landlord it was held that the landlord having reserved the right to repair there was a duty on him, arising from proximity, to prevent injury to persons using the highway from a nuisance on the premises of which he had knowledge, and that he was therefore liable to the plaintiff.[7]

The defendants were the owners of a house and yard abutting on a highway, and separated therefrom by a wall which was in such a defective state of repair as to constitute a public nuisance in the highway. The plaintiff, a child of nine years of age, who was visiting the tenant of the premises, while playing in the yard was injured by a heavy stone which fell from the wall upon her. In an action against the owners for damages for the injuries so sustained it was held that, as the plaintiff was not using the highway when the accident occurred, she was not entitled to recover damages from the defendants.[8] The owner of a block of flats let a top flat to a tenant, but kept the roof of the building and the guttering appurtenant thereto in his own possession and control. The guttering became defective and rain-water which should have been carried away escaped and flowed upon the wall of the tenant's flat and made the flat so damp that the tenant

[1] *Todd* v. *Flight*, (1860) 9 C. B. (N. S.) 377.

[2] *Roswell* v. *Prior*, (1701) 12 Mod. 635.

[3] *Harris* v. *James*, (1876) 45 L. J. Q. B. 545.

[4] *Wilchick* v. *Marks and Silverstone*, [1934] 2 K. B. 56.

[5] *Barker* v. *Herbert*, [1911] 2 K. B. 633.

[6] *Cavalier* v. *Pope*, [1906] A. C. 428.

[7] *Wilchick* v. *Marks and Silverstone*, [1934] 2 K. B. 56.

[8] *Bromley* v. *Mercer*, [1922] 2 K. B. 126.

suffered injury to her health and sustained damage. The landlord had notice of the defect, but was dilatory and negligent in remedying it. In an action by the tenant against the landlord, it was held that the landlord was liable.[1]

Liability of purchaser of property having nuisance on it.—If a nuisance is created and a man purchases the premises with the nuisance upon them, though there is a demise for a term at the time of the purchase, so that the purchaser has no opportunity of removing the nuisance yet by purchasing the reversion of the existing nuisance, he makes himself liable for the continuance of the nuisance. But if, after the reversion is purchased, the nuisance is erected by the occupier, the reversioner incurs no liability; yet, in such a case, if there were only a tenancy from year to year, or any short period, and the landlord chose to renew the tenancy after the tenant had erected the nuisance, and he knew of it, that would make the landlord liable. He is not to let the land with the nuisance upon it.[2]

The purchaser of land with an existing nuisance upon it cannot be sued for continuing the nuisance without a previous request to abate it.[3]

Remedies.

The remedies for nuisances are (1) Abatement, (2) Damages, and (3) Injunction.

(1) Abatement, that is removal of the nuisance by the party injured. The removal must be (*i*) peaceable, (*ii*) without danger to life or limb, and (*iii*) if it is necessary to enter another's land to abate the nuisance, or where the nuisance is a dwelling-house in actual occupation on a common, after notice to remove the same, unless it is unsafe to wait. No more damage may be done than is necessary. It is lawful to remove a gate or barrier which obstructs a right of way but not to break or deface it beyond what is necessary for the purpose of removing it. If a party who has a right to a stone weir were to erect buttresses, one who should oppose the erection of the buttresses could not justify demolishing the weir as well as the buttresses.[4] The abatement of a nuisance by a private individual is a remedy which the law does not favour.[5] Under the Indian Easements Act, the dominant owner cannot himself abate a wrongful obstruction of an easement.[6]

Notice.—In the case of nuisances by an act of commission the injured party may abate them, without notice to the person who committed them, as they are committed in defiance of those whom such nuisances injure.

[1] *Cockburn* v. *Smith*, [1924] 2 K. B. 119.

[2] Per Littledale, J., in *R.* v. *Pedley*, (1834) 1 Ad. & E. 822, 827.

[3] *Penruddock's* case, (1597) 5 Rep. 101.

[4] *Greenslade* v. *Halliday*, (1830) 6 Bing. 379; *Colchester Corporation* v. *Brooke*, (1845) 7 Q. B. 339.

[5] *Lagan Navigation Co.* v. *Lambeg Bleaching, Dyeing and Finishing Co.*, [1927] A. C. 226. A person who removed a dam erected to obstruct his right of way was convicted of mischief under s. 426 of the Indian Penal Code: *Emperor* v. *Zipru*, (1927) 29 Bom. L. R. 481, 51 Bom 487.

[6] Section 36 of Act V of 1882.

In the case of nuisances by an act of omission notice is necessary, except (*a*) where branches of trees overhanging on one's property are to be cut, and (*b*) where the security of lives and property require a speedy remedy.[1]

Tree overhanging another person's boundary.—If a tree overhangs the land of another person, then that person can lawfully cut the overhanging branches even without giving notice, however long they may have overhung his land.[2] A person cannot acquire as easement the right of projecting the branches of trees growing on his land over the land of another person.[3] But the right to lop the branches does not carry with it the right to pick and appropriate the fruit that grows on it. If a person appropriates the fruit he will be guilty of conversion.[4] A person cannot cut off the overhanging branches of a tree standing partly on his own land and partly on the land of his neighbour who is entitled to its fruits.[5]

(2) Damages.—The principle to be applied in cases of nuisance is not whether the defendant is using his own property reasonably or otherwise, but whether he injures his neighbour.[6] The measure of damages is the diminution in value of the property in consequence of the nuisance. The plaintiffs must prove some special damage.

In cases of continuing nuisance, the Court cannot lawfully give damages in respect of any injury subsequent to the day of the commencement of the action, for every day that the nuisance continues there is a fresh cause of action in respect of which further damages are recoverable. But if substantial damages are once given and a fresh action is brought for the continuance of the nuisance, exemplary damages may be given to compel

1 *Earl of Lonsdale* v. *Nelson*, (1823) 2 B. & C. 302; *Jones* v. *Williams*, (1843) 11 M. & W. 176; *Lagam Navigation Co.* v. *Lambeg Bleaching, Dyeing and Finishing Co.*, [1927] A. C 226.

2 *Norris* v. *Baker*, (1613) 8 Roll 393: *Lemmon* v. *Webb*, [1895] A. C. 1, *Hari Krishna* v. *Shankar Vithal*, (1894) 19 Bom. 420; *Arumugha Goundan* v. *Rangaswami Goundan*, (1938) 47 L. W. 324. An injunction was granted to restrain defendants from obstructing plaintiff to cut off the branches of a tree which was regarded as an object of veneration by Hindus: *Behari Lal* v. *Ghisa Lal*, (1902) 24 All. 499. It is open to the Court to grant a mandatory injunction for the removal of such nuisance; *Lakshmi Narain Banerjee* v. *Tara Prasanna Banerjee*, (1904) 31 Cal. 944; *Vishnu* v. *Vasudeo*, (1918) 20 Bom. L. R. 826, 43 Bom. 164. The fact that the party complaining has merely a leasehold and not a freehold would not in any manner alter the case: *Maung Po Thaung* v. *Mg. Gyi*, (1923) 1 Ran. 281. See *Smith* v. *Giddy*, [1904] 2 K. B. 448, where an adjoining landowner was held liable for allowing his trees to overhang his boundary to the damage of the plaintiff's crops. See *Crowhurst* v. *Amersham Burial Board*, (1878) 4 Ex. D. 5.

3 *Keshav* v. *Shankar*, (1925) 27 Bom. L. R. 663. Where a person sold a portion of his land with a tree on it, the branches of which overhung on the remaining land of the vendor, and the vendor wanted to cut off the overhanging branches, it was held that as the vendor had not expressly reserved to himself a right to cut off the branches, the right to project the branches must be deemed to have been transferred by common intention of the parties: *Arumugha Goundan* v. *Rangaswami Goundan*, sup.

4 *Mills* v. *Brooker*, [1919] 1 K. B. 555.

5 *Someshwar* v. *Chunilal*, (1919) 22 Bom. L. R. 790, 44 Bom. 605.

6 *Reinhardt* v. *Mentasti*, (1889) 42 Ch. D. 685, 690.

an abatement.[1] Damages may be given, instead of an injunction, where there are found in combination the following requirements, namely, where the injury to the plaintiff's rights is (1) small, (2) capable of being estimated in money, (3) capable of being adequately compensated by a small money payment, and (4) where it would be oppressive to the defendant to grant an injunction.[2]

(3) **Injunction.**—In order to obtain an injunction it must be shown that the injury complained of as present or impending is such as by reason of its gravity, or its permanent character, or both, cannot be adequately compensated in damages. If the injury is continuous the Court will not refuse an injunction because the actual damage arising from it is slight.[3]

No mandatory injunction against a private individual for what is a mere nuisance in law will be granted except where it has been created and persisted in in defiance of local authority and that local authority has not sufficient power to enforce compliance with the law.[4]

[1] *Battishill* v. *Reed*, (1856) 18 C. B. 696; *Galstaun* v. *Doonia Lal Seal*, (1905) 32 Cal. 697.

[2] Per Smith, L. J., in *Shelfer* v. *City of London Elec. Light Co.*, [1895] 1 Ch. 287.

[3] *Att.-Genl.* v. *Sheffield Gas Co.*, (1853) 3 De G. M. & G. 304; *Att.-Genl.* v. *Cambridge Consumers' Gas Co.*, (1868) L. R. 4 Ch. 71; *Wood* v. *Conway Corporation*, [1914] 2 Ch. 47.

[4] *Advocate-General of Bombay* v. *Haji Ismail Hasham*, (1909) 12 Bom. L. R. 274.

CHAPTER XXII.

FRAUD AND MISREPRESENTATION.

THE making of a representation which a party knows to be untrue, and which is intended, or is calculated, to induce another to act on the face of it, so that he may incur damage, is a fraud in law.[1] Fraud implies a wilful act on the part of one, whereby another is sought to be deprived, by unjustifiable means, of what he is entitled to.[2] A false affirmation made by the defendant with intent to defraud the plaintiff, whereby the plaintiff receives damage, is the ground of an action for deceit. In such an action, it is not necessary that the defendant should be benefited by the deceit, or that he should collude with the person who is,[3] or that the false representation should have been made from a corrupt motive of gain to the defendant or a wicked motive of injury to the plaintiff.[4]

In the leading case of *Derry* v. *Peek*,[5] Lord Herschell laid down: "First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false, has obviously no such honest belief. Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made. . . .

"In my opinion making a false statement through want of care falls far short of, and is a very different thing from, fraud, and the same may be said of a false representation honestly believed though on insufficient grounds...fraud is essential to found an action of deceit, and that it cannot be maintained where the acts proved cannot properly be so termed ..At the same time I desire to say distinctly that when a false statement has been made the questions whether there were reasonable grounds for believing it, and what were the means of knowledge in the possession of the person making it, are most weighty matters for consideration. The ground upon which an alleged belief was founded is a most important test

[1] *Polhill* v. *Walter*, (1832) 3 B. & Ad. 114.
[2] *Green* v. *Nixon*, (1857) 23 Beav. 530, 535.
[3] *Pasley* v. *Freeman*, (1789) 3 T. R. 51, 2 Sm. L. C. (13th Edn.) 59.
[4] *Polhill* v. *Walter*, sup.
[5] (1889) 14 App. Cas. 337, 374, 375, 376. See *Tackey* v. *McBain*, [1912] A. C. 186.

of its reality...if I thought that a person making a false statement had shut his eyes to the facts, or purposely abstained from inquiring into them, I should hold that honest belief was absent, and that he was just as fraudulent as if he had knowingly stated that which was false."

Thus, to create a right of action for deceit there must be a fraudulent representation; and a representation in order to be fraudulent must be one—

(1) which is untrue in fact;

(2) which the defendant knows to be untrue or is indifferent as to its truth;[1]

(3) which was intended or calculated to induce the plaintiff or a third person to act upon it;[2] and

(4) which the plaintiff or the third person acts upon and suffers damage.

(1) Falsehood.—There must be an active attempt to deceive by a statement which is false in fact and fraudulent in intent. The representation must be a representation of fact. A mere expression of opinion, which turns out to be unfounded, is not sufficient. There is a wide difference between the vendor of property saying that it is worth so much, and his saying that he gave so much for it; the first is an opinion which the buyer may adopt if he will, the second is an assertion of fact which, if false to the knowledge of the seller, is also fraudulent.

A suppression of the truth (*suppressio veri*) may amount to a suggestion of falsehood (*suggestio falsi*). Concealment of this kind is sometimes called "active," "aggressive," or "industrious," but perhaps the word itself, as opposed to non-disclosure, suggests the active element of deceit which constitutes fraudulent misrepresentation. There must be "such a partial and fragmentary statement of fact, as that the withholding of that which is not stated makes that which is stated absolutely false."[3] "Half the truth will sometimes amount to a real falsehood."[4]

Mere silence with regard to a material fact will not give a right of action unless—

(*a*) active artificial means have been taken to prevent the other party from discovering the fact for himself; or

(*b*) the essence of the transaction implied confidence, reposed in the party concealing, to divulge all material facts.

Non-disclosure when there is no duty to disclose is not fraud.[5] But there are circumstances when a duty is cast on a person to disclose material facts. This duty may arise in several ways: (1) It may be a duty which a man owes to the world at large, such as not to leave a loaded gun in a

[1] *Derry* v. *Peek*, (1889) 14 App. Cas. 337.
[2] *Polhill* v. *Walter*, (1832) 3 B. & Ad. 114.
[3] Per Lord Cairns in *Peek* v. *Gurney*, (1873) L. R. 6 H. L. 377, 403.
[4] Per Lord Chelmsford in *ibid*, p. 392.
[5] *Ward* v. *Hobbs*, (1878) 4 App. Cas. 13, 26.

public place; or (2) a duty arising out of fiduciary relationship between the parties; or (3) a duty arising out of the nature of the contract as when it is *uberrimæ fidei*.[1] When the duty to disclose arises in the first way the action must be founded on negligence. When it arises in either of the two remaining ways the remedy will depend upon the presence or absence of fraud. If there is no fraud in the sense of deceit, equity will allow rescission with a right to restitution but will not award damages. If however there is deceit then there is an additional right to damages founded on tort.[2]

Leading case.—PASLEY *v.* FREEMAN.

False representation as to solvency of a person.—In the leading case the plaintiff was dealing in cochineal, and at the time when the cause of action arose had a large stock on hand which he was anxious to dispose of. The defendant learning of this told the plaintiff that he knew one Falch who would purchase the cochineal. The plaintiff said, "Is he a respectable and substantial person"? "Certainly he is", answered the defendant, well knowing he was not of the sort. On the faith of his representation the plaintiff gave to Falch 16 bags of cochineal of the value of nearly £3,000 on credit. Upon the bill becoming due it turned out that Falch was insolvent, and being unable to recover his money from Falch, the plaintiff sued the defendant for making to him a false representation whereby he was damnified, and it was held that the defendant was liable to the plaintiff to the extent he had suffered in consequence of the former's false statement as to the credit and character of Falch.[3]

Selling diseased cow.—The defendant sold a cow, fraudulently representing that it was free from infectious disease, and the plaintiff having placed the cow with five others they caught the disease and died. It was held that the plaintiff was entitled to recover as damages the value of all the cows as the death was the natural consequence of his acting on the faith of defendant's representation.[4]

Selling infectious pigs.—The defendant sent for sale to a public market pigs which were to his knowledge infected with a contagious disease: they were exposed for sale subject to a condition that no warranty would be given and no compensation would be made in respect of any default. The plaintiff bought the pigs and put them with other pigs which became infected; some of the pigs bought as well as some of the other pigs died of the disease. The plaintiff sued to

[1] *Nocton* v. *Ashburton (Lord)*, [1914] A. C. 932; *Haji Ahmad Khan* v. *Abdul Gani Khan*, [1937] Nag. 299.

[2] *Haji Ahmad Khan* v. *Abdul Gani Khan*, ibid. In this case the plaintiff and the defendant entered into an agreement for the marriage of their son and niece, respectively, and the plaintiff spent Rs. 217 on a certain ceremony. The plaintiff then discovered that the girl had suffered from epileptic fits during her childhood and so broke off the engagement and sued for restitution of the Rs. 217 he had so spent. It was held that the contract was one *uberrimæ fidei* and so there was a duty cast on the defendant to disclose all material defects of which he was aware, and that since the case was of passive non-disclosure and since no question of deceit arose the plaintiff was entitled to rescission of the contract with a right to restitution and not damages.

[3] *Pasley* v. *Freeman*, (1789) 3 T. R. 51.

[4] *Mullett* v. *Mason*, (1866) L. R. 1 C. P. 559. See *Pickering* v. *Dowson* (1813) 4 Taunt. 779, 785.

recover damages for the loss he had sustained. It was held that no action lay, for the plaintiff's conduct, in exposing the pigs for sale in the market, did not amount to a representation that they were free from disease.[1]

Selling unsubstantial house.—Where the vendor of a house, knowing of a defect in the wall, plastered it up and papered it over, it was held that an action of deceit lay.[2]

Letting ruinous house.—The plaintiff sued for damages arising from the defendant's fraud in letting to the plaintiff a house for a term of years which he knew to be required for immediate occupation, without disclosing that it was in a ruinous condition; it was held that no such action lay, for there was no implied duty in the owner of a house to inform the tenants of its condition.[3]

(2) Knowledge or ignorance.—The representation must be made with knowledge of its falsehood or without belief in its truth. Unless this is so, a representation which is false gives no right of action to the party injured by it. An untrue statement as to the truth or falsity of which the man who makes it has no belief, is fraudulent, for, in making it, he affirms he believes it, which is false.[4]

(*a*) A false statement through want of care falls far short of, and is a very different thing from, fraud, and the same may be said of a false representation honestly believed though on insufficient grounds.[5] If a person has formed no belief whether the statement is true or false, and makes it recklessly without caring whether it is true or false, an action will lie against him. But not so if he carelessly makes the statement without appreciating the importance and significance of the words used, unless indifference to their truth is proved.[6]

(*b*) If a person makes a representation by which he induces another to take a particular course and the circumstances are afterwards altered to the knowledge of the party making the representation but not to the knowledge of the party to whom the representation is made, it is the imperative duty of the party who has made the representation to communicate to the party to whom the representation has been made the alteration of those circumstances.[7]

(*c*) As every one who makes a statement, in order to induce another to act on it, must be taken, at least, to represent that he does believe it, an action lies if he had no belief, but acted recklessly, careless whether the statement was true or false, provided he was conscious that he did not

1 *Ward* v. *Hobbs*, (1877) 3 Q. B. D. 150.
2 *Schneider* v. *Heath*, (1813) 3 Camp. 506.
3 *Keates* v. *The Earl of Cadogan*, (1851) 10 C. B. 591.
4 *Smith* v. *Chadwick*, (1884) 9 App. Cas. 187, 203.
5 Per Lord Herschell in *Derry* v. *Peek*, (1889) 14 App. Cas. 337, 375; *United Motor Finance Co.* v. *Addison & Co., Ltd.*, (1936) 39 Bom. L. R. 706, P.C.
6 *Angus* v. *Clifford*, [1891] 2 Ch. 449.
7 *Praill* v. *Baring*, (1864) 4 De G. J. & S. 318.

believe the statement.[1] If a man, in the course of business, volunteers to make a statement on which it is probable that, in the course of business, another will act, there is a duty which arises towards the person to whom he makes that statement. There is clearly a duty not to state a thing which is false to his knowledge, and further than that there is a duty to take reasonable care that the statement shall be correct.[2]

The rule in *Derry* v. *Peek* does not apply to—

(*a*) Directors issuing a prospectus. The Directors Liability Act was passed *owing to the decision in Derry* v. *Peek. That Act is now* embodied in the Companies Act, 1929.[3] A director or a promoter or other *person authorizing* the issue of a *prospectus of a company is liable to* pay compensation to all persons who subscribe for any shares on the faith of the prospectus for the loss or damage they may have sustained by reason of any untrue statement therein, unless it is proved

(1) that he had withdrawn his consent to be a director before the issue of the prospectus, or

(2) that it was issued without his knowledge or consent, and that on becoming aware of its issue, he gave public notice that it was issued without his knowledge or consent, or

(3) that he had reasonable ground for belief in the untrue statement and did believe it up to the time of allotment of the shares, or that it was a fair and correct representation of expert's report or of an official document.[4]

The result is that a director or promoter is liable even for negligent false statements in a prospectus : it is not necessary to show that he was *recklessly and consciously ignorant* whether they were true or not.

(*b*) Where an estoppel is created. When a person has, by his statement, intentionally caused another person to believe a thing to be true and to act upon such belief, he is not allowed to deny the truth of that thing (s. 115, Indian Evidence Act).

(*c*) Where the law of warranty is applicable.[5]

(*d*) Where there is a contractual duty to take care in making the statement.[6]

(*e*) Where there is a fiduciary relationship between the parties or where there are special circumstances.[7]

(*f*) Where there is a statutory duty to give correct information.[8]

[1] *Derry* v. *Peek*, (1889) 14 App. Cas. 337, 375.

[2] *Seton* v. *Lafone*, (1887) 19 Q. B. D. 68.

[3] 19 & 20 Geo. V, c. 23. See the Indian Companies Act, VII of 1913, s. 100

[4] *Ibid*, s. 37 ; *Clark* v. *Urquhart*, [1930] A. C. 28.

[5] *Low* v. *Bouverie*, [1891] 3 Ch. 82, 105 ; *Le Lievre* v. *Gould*, [1893] 1 Q. B. 491. See *United Motor Finance Co.* v. *Romer Dan & Co*, [1937] M. W. N. 1138.

[6] *Dickson* v. *Reuters' Telegraph Co.*, (1877) 3 C. P. D. 1.

[7] *Nocton* v. *Ashburton*, [1914] A. C. 932.

[8] *Dawson & Co.* v. *Bingley Urban District Council*, [1911] 2 K. B. 149.

(g) Where a statement is made in relation to property of a dangerous character.

Leading case.—DERRY *v.* PEEK.

Careless statement in prospectus.—In the leading case an Act incorporating a tramway company provided that carriages might be moved by animal power and with the consent of the Board of Trade, by steam power. The directors issued a prospectus containing a statement that the company had the right by their Act to use steam power instead of horses. The plaintiff took shares on the faith of this statement. The Board of Trade refused their consent to the use of steam power and the company was wound up. In an action against the directors for false statement it was held that they were not liable for the misrepresentation as they honestly believed the statement to be true although they were guilty of some carelessness in making it.[1]

Acceptation of bill of exchange without authority.—The defendants accepted a bill of exchange drawn on A, representing that he had A's authority to do so, and honestly believing that the acceptance would be sanctioned and the bill met by A. The bill was dishonoured; it was held that an action for deceit lay against the defendant by an indorsee for value. Absence of dishonest motive is no defence.[2]

Negligent misrepresentation actionable only if there be duty to give information.—Mortgagees of the interest of a builder under a building agreement advanced money to him from time to time on the faith of certificates given by a surveyor that certain specified stages in the progress of the buildings had been reached. The surveyor was not appointed by the mortgagees, and there was no contractual relation between him and them. In consequence of the negligence of the surveyor the certificates contained untrue statements as to the progress of the buildings, but there was no fraud on his part. It was held that the surveyor owed no duty to the mortgagees to exercise care in giving his certificates, and they could not maintain an action against him by reason of negligence.[3] B, being entitled under a settlement to a life-interest in a trust fund, applied to the plaintiff for a loan on security of such life-interest and referred him to a trustee of the settlement for information. The plaintiff asked the trustee whether B's interest was subject to any incumbrances. The trustee mentioned certain incumbrances but not all, and he did not say there were no others. The plaintiff made an advance to B, but subsequently discovered that the life-interest was subject to several incumbrances prior to his own not mentioned by the trustee. The plaintiff's security being insufficient, he brought an action against the trustee to have him declared liable for the amount due on the security. It was held that

1 *Derry* v. *Peek*, (1889) 14 App. Cas. 337. In *Angus* v. *Clifford*, [1891] 2 Ch. 449, the directors of a company for purchasing and working a mine issued a prospectus containing a statement that the reports of certain engineers therein mentioned were "prepared for the directors." The reports were appended to the prospectus, and gave a very favourable account of the mine. The reports were, in fact, prepared for the vendors of the mine. The plaintiff took shares on the faith of the prospectus, and the shares having greatly fallen in value, he brought an action of deceit against the directors. It was held that the directors were not liable for misrepresentation as they had no intention to deceive, and used the expression "prepared for the directors" carelessly.

2 *Polhill* v. *Walter*, (1832) 3 B. & Ad. 114.

3 *Le Lievre* v. *Gould*, [1893] 1 Q. B. 491.

the trustee was not liable either on the ground of fraud, breach of duty, warranty or estoppel.[1]

Representation should be false to the knowledge of the person making it.—*Quality of a precious stone unknown to the seller.*—The defendant sold to the plaintiff a stone, which he affirmed to be a Bezoar stone, but which proved not to be so. It was held that no action lay against him unless he either knew that it was not a Bezoar stone, or had warranted it to be a Bezoar stone.[2]

Mistake in transmission of a telegram.—Where a telegraph company, by a mistake in the transmission of a message, caused the plaintiff to ship to England large quantities of barley which were not required, and which, owing to a fall in the market, resulted in a heavy loss, it was held that the representation not being false to the knowledge of the company, gave no right of action to the plaintiff.[3]

(3) Representation must be to induce a person to act on it.—The representation must have been intended, from the mode in which it is made, to induce another to act on the faith of it.[4] It is not necessary that the representation should be made to the plaintiff directly; it is sufficient if it is made to a third person to be communicated to the plaintiff, or to be communicated to a class of persons of whom the plaintiff is one, or even if it is made to the public generally with a view to its being acted on, and the plaintiff, as one of the public, acts on it and suffers damage thereby.[5] Where the defendant sold a gun to the father of the plaintiff, for the use of himself and his sons, representing that the gun was made by a well-known maker and safe to use and the son used the gun, which exploded injuring his hand, it was held that the defendant was liable to the son, not on his warranty for there was no contract between them, but for deceit.[6] A tradesman, who contracts with an individual for the sale to him of an article to be used for a particular purpose by a third person, is not, in the absence of fraud, liable for injury, caused to such person by some defect in the construction of the article.[7]

No one can escape liability for his own fraudulent statements by inserting in a contract a clause that the other party shall not rely upon them.[8]

(4) Injury to plaintiff.—The false representation should have

1 *Low* v. *Bouverie*, [1891] 3 Ch. 82.

2 *Chandelor* v. *Lopus*, (1603) Cro. Jac. 4, 2 Sm. L. C. (13th Edn.) 54.

3 *Dickson* v. *Reuter's Telegram Co.*, (1877) 3 C. P. D. 1.

4 *Polhill* v. *Walter*, (1832) 3 B. & Ad. 114

5 *Swift* v. *Winterbotham*, (1873) L. R. 8 Q. B. 244, 253; *Richardson* v. *Silvester*, (1873) L. R. 9 Q. B. 34.

6 *Langridge* v. *Levy*, (1837) 2 M. & W. 519. This decision turns on the fact that the representation was made with a view that the plaintiff should be one of the persons acting upon it; so that the case would have been altered had the injured person been a mere stranger who had found the gun lying idle, and had taken it up and fired it, and been hurt thereby. Lord Esher criticises this case in *Heaven* v. *Pender*, (1883) 11 Q. B. D. 503, at pp. 511-12, suggesting that the plaintiff might have recovered on the ground of negligence.

7 *Ibid.*

8 *Pearson & Son, Ltd.* v. *Dublin Corporation*, [1907] A. C. 351.

been made with the intent that it should be acted upon by a person in the manner that occasions injury or loss.[1] The plaintiff must show that he was deceived by the fraudulent statement and acted upon it to his prejudice.[2] Where the defendant sold a steel cannon to the plaintiff, having concealed a defect in it, and the plaintiff never inspected the cannon, which, owing to the defect, burst on being used, it was held that the defendant was not liable, as the plaintiff never inspected the gun and was not deceived by the attempted fraud.[3]

Fraud without damage, or damage without fraud, gives no cause of action ; but where these two concur, an action lies. An action cannot be supported for telling a bare naked lie, that is, saying a thing which is false, knowing or not knowing it to be so, and without any design to injure, cheat, or deceive another person. Every deceit comprehends a lie, but a deceit is more than a lie on account of the view with which it is practised, it's being coupled with some dealing, and the injury which it is calculated to occasion, and does occasion, to another person.[4] The injury must be the immediate, and not the remote, consequence of the representation made.[5] If the representation is untrue it is no defence that the person to whom the representation was made had the means of discovering, and might, with reasonable diligence, have discovered, that it was untrue ; or that he made a cursory inquiry into the facts. To escape liability the defendant must show either that the plaintiff had knowledge of the facts which showed it to be untrue, or that he stated in terms, or showed clearly by his conduct, that he did not rely on the representation.[6]

Selling injurious hair-wash.—The plaintiffs, husband and wife, by their declaration alleged that the defendant, in the course of his business, professed to sell a chemical compound represented by him to be fit to be used for a hair-wash. The husband thereupon bought a bottle of the hair-wash which was used by the wife, who was injured by the wash. It was held that the declaration disclosed a good cause of action.[7]

Train announced as running taken off.—Where a train which had been taken off was announced as still running in the current time-table of a railway company, this was false representation, and a person who by relying on it had missed

[1] *Barry* v. *Croskey*, (1861) 2 J. & H. 1.

[2] *Arkwright* v. *Newbold*, (1881) 17 Ch. D. 301, 324.

[3] *Horsfall* v. *Thomas*, (1862) 1 H. & C. 90.

[4] *Pasley* v. *Freeman*, (1789) 3 T. R. 51, 56, 2 Sm. L. C. 51.

[5] *Barry* v. *Croskey*, sup.

[6] *Redgrave* v. *Hurd*, (1881) 20 Ch. D. 1 : *Dobell* v. *Stevens*, (1825) 3 B. & C. 623.

[7] *George* v. *Skivington*, (1869) L. R. 5 Ex. 1. In *Longmeid* v. *Holliday*, (1851) 6 Ex. 761, the defendant was the maker and seller of certain lamps, called "The Holliday Lamp." A person bought a lamp to be used by his wife and himself in his shop. When the wife attempted to use the lamp, it exploded and injured her. It appeared that the accident arose from the defective construction of the lamp, but the defendant did not know of it. In an action for damages by the wife it was held that she could not maintain an action, there being no misfeasance towards her independently of the contract, which was with the husband alone.

an appointment and incurred loss, was held to have an action for deceit.[1]

False statement regarding shares.—Where a director of a company put forth transferable shares into the market, and published and circulated false statements and representation for the purpose of selling the shares, the false representation was deemed in law to be made to all persons who read the public announcements, and became purchasers of shares on the faith of the statements contained in them.[2]

False announcement of sale.—The defendant had inserted in a newspaper an advertisement that a certain farm was to be let with immediate possession. The plaintiff went down to see the farm, and incurred expenses in examining the property. The defendant knew at the time he inserted the advertisement that he had not the power to let the farm, and that it was not to be let. It was held that this amounted to a false representation.[3]

Prospectus cases.—A prospectus for an intended company contained misrepresentation of facts known to the directors who issued it. Being addressed to the whole public, any one might take up the prospectus and appropriate to himself its representations, by applying for an allotment of shares. It was held that when the allotment was completed the office of the prospectus was exhausted, and that a person who had not become an allottee, but was only a subsequent purchaser of shares in the market, was not so connected with the prospectus as to render those who had issued it liable to indemnify him against the losses which he had suffered in consequence.[4] But where a prospectus is issued not merely to induce application for an allotment of shares, but also to induce persons to purchase the shares in the market the function of the prospectus is not exhausted upon the allotment of shares; and a person who having received a prospectus afterwards purchases shares in the open market relying upon false representations contained in such prospectus, has a cause of action against the promoters in respect of such false representations if he thereby sustains a loss.[5]

Fraudulent representations as to credit.—A fraudulent representation as to the credit or financial ability of a person is actionable at common law. Thus if A sells goods to B on credit on the faith of a representation made by C to A that B might be safely trusted, and the representation is false, and made with intent to induce A to sell the goods on credit to B, C is liable to A at common law for the loss occasioned to A by his fraudulent misrepresentation.[6] Since, however, Lord Tenterden's Act,[7] no action can be brought in England in respect of such a misrepresentation unless it was made in writing signed by the party to be charged therewith. There is no such Act in India, and the liability will attach whether the representation is written or verbal.

Damages.—The plaintiff may recover damages for any injury which is the direct and natural consequence of his acting on the faith of the de-

[1] *Denton* v. *G. N. Ry.*, (1856) 5 E. & B. 860.

[2] *Scott* v. *Dixon*, (1859) 29 L. J. Ex. 62, cited in a note to *Bedford* v. *Bagshaw*, (1859) 29 L. J. Ex. 59; *Barry* v. *Croskey*, (1861) 2 J. & H. 1.

[3] *Richardson* v. *Silvester*, (1874) L. R. 9 Q. B. 34.

[4] *Peek* v. *Gurney*, (1873) L. R. 6 H. L. 377. See *Tackey* v. *McBain*, [1912] A. C. 186.

[5] *Andrews* v. *Mockford*, [1896] 1 Q. B. 372.

[6] *Pasley* v. *Freeman*, (1789) 3 T. R. 51.

[7] 9 Geo. IV, c. 14, s. 6.

fendant's representations.[1] The damages are arrived at by considering the difference in the position a person would have been in had the representation made to him been true, and the position he is actually in, in consequence of its being untrue.[2] All who profit more or less by a fraud, and all who aid and abet it, as well as those who directly commit it, are liable in damages.

Where a cattle dealer sold to the plaintiff a cow, and fraudulently represented that it was free from infectious disease, when he knew that it was not, and the plaintiff having placed the cow with five others, they caught the disease and died. It was held that the plaintiff was entitled to recover as damages the value of all the cows.[3]

Misrepresentations made by Agents.

MISREPRESENTATIONS MADE BY AGENTS.

- The principal *knows* the representation to be *false*.
  - If he authorizes the making of it—principal liable.
  - If the representation is made by the agent in the general course of his employment—the principal is liable.
    - If the agent *knows* that the representation is false, he is liable; but if he believes it to be true he is not liable.
- The principal *thinks* the representation to be *true*.
  - If he authorizes the making of it and
    - The agent *knows* at the time or *finds out* afterwards that it is *false*—principal liable.
    - The agent *thinks* it to be *true*—principal liable.
  - If the representation is made by the agent in the general course of the employment.
    - The agent *knows* it is *false*—principal liable.
    - The agent *thinks* it to be *true*—principal not liable.

The fraud of the agent, acting within the scope of his employment, is the fraud of the principal. But the liability of the principal depends on several considerations :—

[1] *Mullett* v. *Mason*, (1866) L. R. 1 C. P. 559. Where the plaintiff's property was fraudulently transferred, he was held entitled to recover the damage or loss which he sustained on account of such fraudulent transfer from the actual transferor, and from the person who was found to have been the prime mover and instigator in the transaction as well as from his own agent who consented to such transfer and the purchaser who, being aware of circumstances sufficient to create suspicion, dealt with persons who had no authority to sell : *Wharton* v. *Moona Lall*, (1866) 1 Agra 96.

[2] *Firbanks' Executors* v. *Humphreys*, (1886) 18 Q. B. D. 54 ; *Sha Karamchand* v. *Sheth Chelabhai*, (1896) P. J. 335.

[3] *Mullett* v. *Mason*, sup. See *Hill* v. *Balls*, (1857) 27 L. J. Ex. 45, where a similar action was brought by a man who purchased a horse afflicted with glanders and believing it to be healthy put it into his stable with another horse that became infected and died of the disease.

A. The principal knows the representation to be false.

(I) He authorizes the making of it. In this case whether the agent knows it to be false or thinks it to be true, the principal is liable.

If the agent knows that it is false, he is liable; but if he believes it to be true, he is not liable.

(II) The representation is made by the agent in the general course of his employment, but without any specific authorization from the principal. The principal is liable.[1]

If the agent knows that the statement is false, he is liable; but if he believes it to be true, he is not liable.

It matters not in respect of the principal and the agent which of them possesses the guilty knowledge or which of them makes the incriminating statement. If between them the misrepresentation is made so as to induce the wrong, and thereby damages are caused, it matters not which is the person who makes the representation or which is the person who has the guilty knowledge.[2]

B. The principal thinks the representation to be true.

(I) He authorizes it to be made. When

(*i*) The agent knows at the time, or finds out afterwards, that it is false, the principal is liable.[3]

(*ii*) The agent thinks it to be true—here the principal is not liable.

(II) The agent makes the representation in the general course of his employment, but without any special authorization. When

(*i*) The agent knows it is false, the principal is liable.[4] It is not necessary that the principal should have derived any benefit from the fraud of his agent.[5]

(*ii*) The agent thinks it to be true—the principal is not liable.

Thus, we find that the principal is liable in all possible cases except when both he and his agent believe the latter's misrepresentation to be the truth.[6]

[1] *Cornfoot* v. *Fowke*, (1840) 6 M. & W. 358. This case did not decide that the principal and agent could be so divided in responsibility that—like the schoolboy's game of "I did not take it, I have not got it"—the united principal and agent might commit fraud with impunity, per Earl of Halsbury in *S. Pearson & Son, Ltd.* v. *Dublin Corporation*, [1907] A. C. 351, 357. See *London County, etc., Properties* v. *Berkeley Property, Co.*, [1936] 2 All E. R. 1039, where it is held that a Corporation is liable for the fraudulent statement of its agent, even if the Corporation is innocent. See *Dehra Dun-Mussoorie Electric Tramway Co.* v. *Hansraj*, (1935) 58 All. 342.

[2] Per Earl of Halsbury in *S. Pearson & Son., Ltd.*, v. *Dublin Corporation*, sup., p. 358.

[3] *Barwick* v. *The English Joint Stock Bank*, (1867) L. R. 2 Ex. 259.

[4] *Udell* v. *Atherton*, (1861) 7 H. & N. 172, 181.

[5] *Lloyd* v. *Grace Smith & Co.*, [1912] A. C. 716. *Lloyd's* case is followed in *Dinabandhu Saha* v. *Abdul Latif*, (1922) 50 Cal. 258, which dissents from the earlier case of *Gopal Chandra Bhattacharjee* v. *Secretary of State for India in Council*, (1909) 36 Cal. 647, which was based on *Barwick's* case; *Swire* v. *Francis*, (1877) 3 App. Ca 106.

[6] See Fraser, 153.

When a man has made a statement untrue to his knowledge to induce another, whom he does not believe to know its untruth, to act upon it, and that other has acted upon it, in ignorance and to his damage, the maker of the false representation is not allowed to protect himself by proving that an agent of the other knew of the untruth.[1]

The plaintiff, having for some time, on a guarantee of defendants, supplied D, a customer of theirs, with oats on credit, for carrying out a Government contract, refused to continue to do so unless he had a better guarantee. The defendants' manager thereupon gave him a written guarantee to the effect that the customer's cheque on the bank in plaintiff's favour, in payment of the oats supplied, should be paid, on receipt of the Government money in priority to any other payment "except to this bank." D was then indebted to the bank to the amount of £12,000, but this fact was not known to the plaintiff, nor was it communicated to him by the manager. The plaintiff, thereupon, supplied the oats to the value of £1,227. The Government money, amounting to £2,676, was received by D and paid in into the bank; but D's cheque for the price of the oats drawn on the bank in favour of the plaintiff was dishonoured by the defendants, who claimed to detain the whole sum of £2,676, in payment of D's debt to them. The plaintiff having brought an action for false representation, it was held (1) that there was evidence to go to the jury that the manager knew and intended that the guarantee should be unavailing and fraudulently concealed from the plaintiff the fact which would make it so; and (2) that the defendants would be liable for such fraud.[2] An officer of a banking corporation, whose duty it was to obtain the acceptance or bills of exchange in which the bank was interested, fraudulently, but without the knowledge of the president or directors of the bank, made a representation to A, which, by omitting a material fact, misled A, and induced him to accept a bill in which the bank was interested, and A was compelled to pay the bill, it was held that A could recover from the bank the amount so paid, and that in an action of deceit, the fraud of the agent might be treated for the purpose of pleading, as that of the principal.[3] In *Fauntleroy forgery* cases, Fauntleroy, who was a partner in the banking house of Marsh & Co., forged powers-of-attorney for the sale of stock belonging to the customers of the bank. Marsh & Co. had an account with Martin Stone & Co., and the broker who sold out the stock under the forged powers-of-attorney remitted the proceeds of the sale to the credit of Marsh & Co., with Martin, Stone & Co. Fauntleroy then drew out these moneys, by a cheque signed by him in the name of his firm, and applied them to his own use. The firm of Marsh & Co. was, however, held liable for them, although none of the partners except Fauntleroy had any hand in his forgeries or frauds, or in fact knew anything of what had taken place.[4]

[1] *Wells* v. *Smith*, [1914] 3 K. B. 722, 725.

[2] *Barwick* v. *English Joint Stock Bank*, (1867) L. R. 2 Ex. 259.

[3] *Mackay* v. *Commercial Bank of New Brunswick*, (1874) L. R. 5 P. C. 394.

[4] *Stone* v. *Marsh*, (1827) 6 B. & C. 551; *Keating* v. *Marsh*, (1834) 1 M. & A. 592; *Marsh* v. *Keating*, (1831) 2 C. & F. 250; *Ex parte Bolland*; *In re Marsh*, (1828) Mont. & M. 315; *Hume* v. *Bolland*, (1832) 1 Cr. & M. 130.

CHAPTER XXIII.

TORTS FOUNDED ON CONTRACTS.

IN a large class of cases known as implied contracts, the law recognizes a duty or obligation sometimes arising out of a preceding contract, sometimes independently of any contract. In cases where the duty or obligation arises out of a preceding contract, the violation of the duty is a breach of contract ; such cases, however, present some features in common with those implied contracts which embrace duties independent of any contract. It was usual under the old mode of pleading to state in both these classes the facts out of which the duty or obligation arose, with or without an allegation that such duty arose therefrom. This mode of pleading being similar to that adopted in the case of an ordinary tort and different from that adopted in the case of an express promise, where the promise and a breach of that promise were alleged, these cases acquired the name of torts founded upon contract.

The difference between torts arising from contracts and torts independent of contract is that where a wrongful act is of the latter description the plaintiff's suit is styled an action *ex delicto*, and where of the former class, it is styled an action *ex contractu*, in which case it is necessary that there should be privity between the plaintiff and the defendant, for a man cannot sue upon a contract when there is no privity between himself and the defendant. Privity between the parties is absolutely necessary to support an action *ex contractu*, whereas in the case of an action *ex delicto* the right of action has nothing to do with privity between the parties, but it exists simply because a right has been withheld or violated.[1]

Where there is a privity of contract between two parties there are two classes of cases in which the remedy for a breach of duty arising out of the contract is an action in tort, namely, where the damage is caused by negligence or by fraud.

Division.—The class of injuries, which lie on the borderland, as it were, between contract and tort, and for which an action *ex contractu* or *ex delicto* may generally be brought at the pleasure of the party injured, can, according to Sir Frederick Pollock, be divided into three divisions as follows :—

I. Alternative forms of remedy on the same cause of action.

II. Concurrent or alternative causes of action.

III. Causes of action in tort dependent on a contract not between the same parties.

I. Alternative forms of remedy on the same cause of action.

Although tort in general differs essentially from contract as the found-

[1] *Gerhard* v. *Bates*, (1853) 2 E. & B. 476.

ation of an action, it not infrequently happens that a particular transaction admits of being regarded from two different points of view, so that when contemplated from one of these it presents all the characteristics of a good cause of action *ex contractu*; and, when regarded from the other, it offers to the pleader's eye sufficient materials whereupon to found an action *ex delicto*.[1] Thus, carriers warrant the transportation and delivery of goods entrusted to them; solicitors, surgeons and engineers undertake to discharge their duty with a reasonable amount of skill and with integrity; and for any neglect or unskilfulness by individuals belonging to one of these professions, a party who has been injured thereby may maintain an action either in tort for the wrong done or in contract at his election. In short, wherever there is a contract, and something to be done in the course of the employment which is the subject of that contract, if there is a breach of a duty in the course of that employment, the plaintiff may either recover in tort or in contract.[2] Where there is an employment, which employment itself creates a duty, an action will lie for a breach of that duty, although it may consist in doing something contrary to an agreement made in the course of such employment, by the party upon whom the duty is cast.[3]

Where the same facts give rise to a breach of contract and also a breach of a common law duty, a party to the contract may sue at his election on the contract, or in tort for a breach of the common law duty.[4] But a stranger to the contract can only sue in tort. He cannot, where a breach of contract incidentally causes damage to him, recover in an action against the contracting party in default, unless fraud, negligence, or breach of a legal duty, on the part of such contracting party be proved.[5]

Now that the forms of pleading are generally abolished or greatly simplified, it seems better to say that wherever there is a contract to do something, the obligation of the contract is the only obligation between the parties with regard to the performance, whether there was a duty antecedent to the contract or not. But injury which would have been a tort, as breach of a duty existing at common law, if there had not been any contract, is still a tort.[6]

II. Concurrent causes of action.

Herein we have to consider—

1. Cases where it is doubtful whether a contract has been formed or there is a contract "implied in law" without any real agreement in fact, and the same act which is a breach of the contract, if any, is at all events a tort.

[1] *Legge* v. *Tucker*, (1856) 1 H. & N. 500.
[2] *Brown* v. *Boorman*, (1844) 11 C. & F. 1, 44.
[3] *Courtenay* v. *Earle*, (1850) 10 C. B. 73, 83.
[4] *Meux* v. *Great Eastern Ry.*, [1895] 2 Q. B. 387.
[5] *Dickson* v. *Reuter's Telegram Co.*, (1877) 3 C. P. D. 1.
[6] *Taylor* v. *M. S. & L. Ry.*, [1895] 1 Q. B. 134, Pollock.

Advertising wrong train.—Where a railway company advertised, by their time-tables, a through train, from London to Hull, after they knew that the connecting train (belonging to another company) had been discontinued, and a passenger, having made his arrangements on the faith of these time-tables, travelled by an early train from London to Petersborough, one of the defendant company's stations, and, after transacting his business there, asked for a ticket from Petersborough to Hull by the evening train, so advertised, and found there was no such train, and brought his action for damages, it was held that he was entitled to recover on the ground that the circulation of the time-tables amounted to a representation on the part of the defendants that there was a train, which was false to the knowledge of those making it, and calculated to induce the plaintiff to act as he did.[1]

Loss of servant's luggage whose fare is paid by master.—A servant whose fare has been paid by his master can sue for loss of luggage; the principle being that the duty thrown upon the carrier by receiving the passenger and his luggage to be carried for reward, though arising out of the contract, is independent of the question by whom the reward is paid. The question turned upon the inquiry whether it was necessary to show a contract between the plaintiff and the railway company; and it was held that an action of this sort was in substance not an action of contract but an action of tort against the company as carriers, and the allegation of contract was altogether unnecessary.[2]

Non-payment of fare does not exempt railway company from liability for negligence.—The plaintiff's mother, carrying in her arms the plaintiff, a child over three years old, and consequently liable to pay half fare, took a ticket for herself but not for the plaintiff. By the negligence of defendants, an accident occurred to the train, and the plaintiff was injured. When the plaintiff's mother took her ticket no question was asked as to the plaintiff's age by the defendants' servants, and there was no intention on the part of the mother to defraud the defendants It was held that the plaintiff was entitled to recover for the injury he had sustained, first, on the ground that there was an entire contract to carry both mother and child, which operated in favour of each, secondly, on the ground, that the right, which a passenger by railway had to be carried safely, did not depend on his having made a contract, but that the fact of his being a passenger cast a duty on the company to carry him safely. If there has been fraud on the part of the plaintiff, or, if the plaintiff had been taken into the train without the defendants' authority, no such duty would arise. But here the child, through an honest mistake on the mother's part, was taken into the train by the railway company, and was received as a passenger by their authority.[3]

2. Cases where A can sue B for a tort though the same facts may give him a cause of action against M for a breach of contract. There may be two causes of action with a common plaintiff.

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[1] *Denton* v. *G. N. Ry.*, (1856) 5 E. & B. 860

[2] *Marshall* v. *Y. N. B. Ry.*, (1851) 11 C. B. 655.

[3] *Austin* v. *Great Western Ry.*, (1867) L. R. 2 Q. B. 442; *Harris* v. *Perry & Co.*, [1903] 2 K. B. 219. Thus, unless there be an intention in the passenger to defraud, the mere non-payment of fare will not exempt the railway company from liability for negligence.

Cases arising from contract to travel on lines of two railway campanies —The plaintiff, a passenger, was hurt on alighting at a station owing to th carriages being unsuited to the platform, the station and the platform belongin to the S. W. Railway by whose clerk the plaintiff's return ticket was issued; bu he returned by the train belonging to the defendant company, who had runnin powers on the S. W. Line. It was held that the defendant company was liabl solely on the ground that it actually received plaintiff as a passenger, and thereby undertook the duty of not exposing him to unreasonable peril in any matter incident to the journey. In this case, the following propositions were laid down :—

(1) A railway company issuing a ticket for a journey partly on the company's own line and partly on the line of another company, may be presumably responsible for the safety of the passenger on his whole journey and is liable to compensate him for injuries caused to him by the negligence of the railway servants or defective construction of carriages, or stations, to whichever company they belong.[1]

(2) A railway company may, under certain circumstances, be subject, in favour of a passenger upon such a journey as last mentioned, to similar responsibilities, although as between company and their individual passenger there may be no contract.[2]

(3) The responsibilities of a railway company or any other carrier may be carried still a step further. There are cases in which the carrier may be liable for injuries received by a passenger when carried by him, although no contract for carriage may exist between the carrier and the passenger or any person contracting directly for his carriage, even though there be no direct contract for the carriage of the party injured and suing between the carrier and anybody.[3]

If the company issuing the tickets has been guilty of the negligence which caused the accident, the fact that the accident occurred upon the line of another company will not make the latter company responsible to the injured party.[4] In the case of a through-ticket a company who have not issued the ticket, but who have received the passenger's luggage into their van, are responsible for the loss of it.[5] Where a servant of the plaintiff took a ticket of L. T. etc., Ry. and he travelled in a train drawn by an engine of the G. E. Ry. and the latter company also provided the signalman and so on, and owing to their negligence a collision happened, and he was injured, it was held that the master could sue the latter company. For, although he could not sue the former company, because *qua* them, the wrong was one arising out of contract in respect of which the servant alone could sue, yet the negligence of the latter company did not arise out of any contract. They were entire strangers to the contract, and their tort was a tort pure and simple, consequently the master could sue in respect of it.[6]

1 *G. W. Ry.* v. *Blake*, (1862) 7 H. & N. 987; *Thomas* v. *Rhymney Ry.*, (1871) L. R. 6 Q. B. 266.

2 *Austin* v. *G. W. Ry.*, (1867) L. R. 2 Q. B. 442; *Marshall* v. *Y. N. Ry.*, (1851) 11 C. B. 655.

3 Per Thesiger, L. J., in *Foulkes* v. *M. D. Ry.*, (1880) 5 C. P. D. 157, at pp. 168, 169.

4 *Wright* v. *Midland Ry.*, (1873) L. R. 8 Ex. 137.

5 *Hooper* v. *L. & N. W. Ry.*, (1880) 50 L. J. Q. B. 103, *Foulkes'* case followed.

6 *Berringer* v. *G. E. Ry. Co.*, (1879) 4 C. P. D. 163.

3. Cases where A can sue B for a tort though B's misfeasance ·y also be a breach of a contract made not with A but with M. There ·y be two causes of action with a common defendant, or the same act or ent which makes A liable for a breach of contract to B may make him ble for a tort to Z.

Injury to passenger whose fare is paid by another.—Where a railway com- ny was bound by a statute to carry any officer of the post office whom the stmaster-General should select, and for which service the company was to be nunerated by the Postmaster-General, and the plaintiff, an officer so selected, s injured by the negligence of the company; it was held that, though there s no contract between the plaintiff and the company, yet he was entitled to ng an action for negligence.[1] So an officer, carried under contract with the vernment of India, may sue for an injury done to his property through the lway company's negligence whilst the goods were in their custody, though he ıld not sue the railway company for the non-performance of their duties as rriers.[2]

Injury to goods in possession of servant.—The plaintiff's servant took a ticket, iich he had paid for with the plaintiff's money, for a journey on the defend- t's line He took with him a portmanteau in which was his livery which longed to the plaintiff. At the station the portmanteau was accepted by the mpany as his personal luggage—they not being aware that it contained goods which the plaintiff had an outstanding right—and was handed over to one the company's servants, who negligently overturned it in front of a train, so at it was run over by the train and the goods in it were destroyed. In an tion by the plaintiff against the defendants for damages for injury to her operty caused by the negligence of the defendants' servants it was held that the goods were lawfully with the defendants' licence, on their premises, they re answerable for any injury caused to the goods by the misfeasance of their rvants, not on the ground of a breach of any contract between the plaintiff d the defendants, for there was none such, but as a tort committed by the fendants' servants for which the defendants were responsible.[3]

Master cannot sue for loss of service arising from injury to his servant.—A rvant took a ticket and travelled on a railway, and was injured on his journey rough the negligence of the railway company. The master brought an action ainst the company for the loss of his servant's services through their negligence; ıt there was no contract between the railway company and the master. It was ld that inasmuch as the servant was injured, not by a simple wrong, but by a rong arising out of a breach of duty imposed on the railway company by their ntract with the servant, the action was founded on the contract, and would t lie.[4]

[1] *Collett* v. *L. & N. W. Ry.*, 851) 16 Q B 984.

[2] *Martin* v. *G. I. P. Ry.*, (1867) R. 3 Ex. 9.

[3] *Meux* v. *G. E. Ry.*, [1895] 2 Q. . 387.

[4] *Alton* v. *Midland Ry.*, (1865) C. B. N. S. 213. This case has been severely criticised as laying down bad law. It is inconsistent with the principles laid down in *Marshall* v. *Y. N. R. B. Ry.*, and *Foulkes* v. *Metro. Dis. Ry.*, and latterly doubts have been thrown on it: see *Taylor* v. *M. S. & L. Ry.*, [1895] 1 Q. B. 134.

Son can sue for injury caused by gun bought by his father.—The father of the plaintiff bought a gun of the defendant for the use of himself and his sons and the defendant warranted the gun to be a good and safe gun. The gun burst while the plaintiff was using it and injured his hand. It was held that there had been fraud and damage, the result of that fraud from an act contemplated by the defendant at the time of the sale, and that the action was maintainable.[1]

Injurious hair-wash.—Where the defendant sold a bottle of hair-wash to a husband to be used by his wife, and the latter was injured in using the same, it was held that the duty of the vendor to use ordinary care in compounding the wash extended to the person for whose use the vendor knew it was purchased.[2]

Injurious drink.—The plaintiff drank a bottle of ginger beer, manufactured by the defendants, which a friend had brought from a retailer and given to her. The bottle contained the decomposed remains of a snail which were not detected until the greater part of the bottle had been consumed. The bottle was of a dark opaque glass so that the condition of its contents could not be ascertained by inspection. In a suit by the plaintiff, who suffered from shock and severe gastro-enteritis, to recover damages, it was held that the defendants were liable.[3]

Injurious cloth.—The plaintiff contracted dermatitis as the result of wearing a woollen garment which, when purchased from the retailers, was in a defective condition owing to the presence of excess sulphites which had been negligently left in it in the process of manufacture. It was held that the retailers were liable in contract for breach of warranty and the manufacturers were liable in tort as they failed in their duty to take care.[4]

Defective vehicle.—A built a coach for the Postmaster-General. B horsed it and hired C as a coachman to drive it. The coach broke down from a defect in the building. It was held that C could not sue A.[5] The defendant contracted to keep in repair a number of vans owned by a firm. The plaintiff was a driver in the employment of the firm, and while he was driving one of the vans a wheel came off and he sustained injuries by falling from the van. The van had been in the hands of the defendant's workmen shortly before and on the day of the accident, and the plaintiff's cause of action was based upon the negligence of the workmen in failing properly to inspect and repair the defective state of the van, and the negligent manner in which the repairs were done. It was held that the defendant was under no duty to the plaintiff, and that there was no cause of action.[6] These two cases are no longer of any authority in view of *Donoghue's* case and *Grant's* case. The plaintiff, the owner of a motor cycle to which the defendants had fitted a side-car, was driving the combination along a road. The side-car became detached from the motor-cycle and the plaintiff and his wife, who was sitting in the side-car, sustained injuries. It was held that the defendants were liable to the plaintiff in contract and tort, and the wife in tort.[7]

1 *Langridge* v. *Levy*, (1837) 2 M. & W. 519.

2 *George* v. *Skivington*, (1869) 39 L. J. Ex. 8.

3 *Donoghue* v. *Stevenson*, [1932] A. C. 562.

4 *Grant* v. *Australian Knitting Mills, Ld.*, [1936] A. C. 85.

5 *Winterbottom* v. *Wright*, (1842) 10 M. & W. 109.

6 *Earl* v. *Lubbock*, [1905] 1 K. B. 253.

7 *Malfroot* v. *Noxal Limited*, (1935) 51 T. L. R. 551.

Injury from chandelier.—The plaintiff sued for injuries resulting from the fall of a chandelier in a public house. It was held that the case fell within the principle of *Winterbottom* v. *Wright*. It was conceded, however, that if there had been an allegation that the defendant knew that the chandelier was improperly fixed, the action might have been maintained.[1]

Unskilful treatment of surgeon.—So if a surgeon treated the wife of another man unskilfully, he would be liable to the wife, even though her husband contracted with the surgeon.[2]

Loss from certificates negligently given.—Where mortgagees lent money, by instalments, to a builder, on the faith of certificates negligently granted by the defendant, who was a surveyor appointed not by mortgagees, but by the builder's vendor, and the certificates were inaccurate and the mortgagees thereby suffered loss for which they claimed compensation from the defendant; it was held that as there was no contractual relation between them, the defendant owed no duty to the plaintiffs and the action could not be maintained. It was urged that a certificate carelessly issued was as dangerous as an ill-made gun, or a poisonous hair-wash, and that on that ground the defendant was liable, but the Court did not admit the analogy. If the certificate had been fraudulent, i.e. issued with intent to deceive the plaintiffs, then, independent of any contractual relation, the defendant would have been liable.[3]

III. Causes of action in tort dependent on a contract not between the same parties.

(*a*) Procuring breach of contract.—The principles laid down in *Lumley* v. *Guy*, *Bowen* v. *Hall*, and *Quinn* v. *Leathem* show that A may, under certain circumstances, sue B, if B procures C to break his contract with A. Thus, a contracting party may, indirectly through the contract, though not upon it, have an action against a stranger. (For a full discussion of this subject, see p. 204).

(*b*) Damage to stranger by breach of contract.—A breach of contract between contracting parties will not enable a stranger to sue one of the parties for the injury done to him through the breach. This clearly appears from the cases in which telegraph companies have been held not liable to the receiver of a telegram for its erroneous transmission. These cases have been decided upon the express ground that the contract to transmit the message is made with the sender and not the receiver, and that outside the contract there is no statutory or other duty incumbent upon the telegraph company to transmit a message correctly.

To entitle a third person, not named as a party to the contract, to sue either of the contracting parties, that third person must possess an actual beneficial right which places him in the position of *cestui que trust* under the contract.[4]

[1] *Collis* v. *Selden*, (1868) L. R. 3 C. P. 495.

[2] *Pippin* v. *Sheppard*, (1822) 11 Price 400. See *Parreira* v. *Gonsalves*, (1905) 8 Bom. L. R. 93.

[3] *Le Lievre* v. *Gould*, [1893] 1 Q. B. 491, overruling *Cann* v. *Wilson*, (1888) 39 Ch. D. 39.

[4] *Rakhmabai* v. *Govind Moreshwar*, (1904) 6 Bom. L. R. 421.

Erroneous transmission of telegram.—Where an action for negligence was brought against a company by a person to whom a telegram had been erroneously transmitted, it was held that the action did not lie because the obligation of a telegraph company to use due care and skill in the transmission of a message arose entirely out of contract; and that the defendant's charter had not affected the relation of the company to the sender or the receiver of a despatch, and that, therefore, the contract having been made with the sender of the message, the plaintiff had no right of action.[1]

Misdelivery of telegram.—No action would lie against a telegraph company, at the suit of the receiver, for the misdelivery of a telegram, unless there was either a contract between him and the company, or (possibly) fraud on their part in the transmission of it.[2]

Negligent omission to forward telegram.—Where the defendant, whose business it was to collect and forward telegrams, had negligently omitted to forward one which was in cipher, and so unintelligible to him; the sender, it was held, could recover nominal damages and not a loss of commission which was consequent upon the omission.[3] Telegraph companies may limit their responsibility by special condition.

In America, on the other hand, one who receives a telegram, which, owing to the negligence of the telegraph company, is altered or in other respects untrue, is invariably permitted to maintain an action against the telegraph company for the loss that he sustains through acting on that telegram.

Damages.—Damages in an action of tort founded upon contract must be estimated in the same way as they are estimated in a breach of contract.[4]

1 *Playford* v. *U. K. Elec. Telegraph Co.*, (1869) L. R. 4 Q. B. 706.

2 *Dickson* v. *Reuter's Telegraph Co*, (1877) 2 C. P. D. 62.

3 *Sanders* v. *Stuart*, (1876) 1 C. P. D. 326.

4 *Chinery* v. *Viall*, (1860) 5 H. & N. 288.

SUMMARY.

General Principles.

A TORT is a wrong independent of contract, giving rise to a civil remedy, for which compensation is recoverable. It is an act or omission which prejudicially affects a person in some legal private right. The word 'tort' is derived from the Latin term *tortum*, to twist, and implies conduct which is twisted or tortious. A civil injury for which an action for damages will not lie is not a tort, e.g. public nuisance for which no action for damages will lie by a member of the public.

Tort and contract.—Tort differs from a contract in two ways—

Chapter I. (1) A tort is inflicted against or without consent, a contract is founded upon consent.

(2) In tort no privity is needed, but it is necessarily implied in a contract.

Tort can thus be distinguished from a pure breach of contract :

(1) A tort is a violation of a right *in rem* (right vested in some person and available against the world at large), a breach of contract is an infringement of a right *in personam* (right available only against some determinate person or body). In the case of a tort the duty is one imposed by the *law* and is owed to the community at large. In the case of a contract, the duty is fixed by the will and consent of the parties, and it is owed to a definite person or persons.

(2) Motive is often taken into consideration in a case of tort, but it is immaterial in a breach of contract.

(3) In tort the measure of damages is not strictly limited nor is it capable of being indicated with precision, in a breach of contract the measure of damages is generally more or less nearly determined by the stipulation of the parties.

The same act may amount to a tort and a breach of contract. Carriers, solicitors, or surgeons will be liable for neglect or unskilfulness either in an action for a breach of contract or in tort.

Tort and crime.—A tort also differs from a crime—

(1) A tort is an infringement of the private rights belonging to individuals considered as individuals, a crime is a breach of public rights and duties which affect the whole community considered as a community.

(2) In tort, the wrong-doer has to compensate the injured party, in crime he is punished by the State.

(3) In tort, the injured party brings an action, in crime proceedings are conducted in the name of the Sovereign, and the guilty person is punished by the State.

The same set of circumstances will, in fact, from one point of view constitute a tort, while, from another point of view, amount to a c
(e.g. assault, libel, theft, mischief to property). In the case of an a

the right violated is that which every man has, viz. that his bodily safety shall be respected, and the sufferer is entitled to damages. It is also a menace to the safety of society, and is therefore punished by the State.

Elements of tort.—To constitute a tort three things must concur—

(1) a wrongful act by the defendant;

(2) legal damage to the plaintiff; and

(3) the wrongful act must be of such a nature as to give rise to a legal remedy in the form of an action for damages.

(1) Wrongful act.—An act is wrongful if it invades the private rights of a person, viz.—

(*a*) the right of good reputation;

(*b*) the right of bodily safety and freedom; and

(*c*) the right of property.

(2) Legal damage.—Legal damage is not the same as actual damage. Every invasion of the plaintiff's right, or unauthorized interference with his property, imports legal damage.

In all cases of tort there must be an infringement of a right, and this is expressed by saying that *injuria sine damno* is actionable, while *damnum sine injuria* is not. By *damnum* is meant damage in the substantial sense of money, loss of comfort, service, health or the like. By *injuria* is meant an unauthorized interference with some general private right conferred by law on plaintiff. It is an act or omission of which the law takes cognizance as a wrong. Thus, by *injuria* is meant a tortious act; it need not be wilful and malicious; for though it be accidental, if it be tortious, an action will lie.

Injuria sine damno, therefore, means an infringement of a legal private right without any actual loss or damage. In such a case the person whose right is infringed has a good cause of action. It is not necessary for him to prove any special damage, because every injury imports a damage when a man is thereby hindered of his right. Actual perceptible damage is not, therefore, indispensable as the foundation of an action; it is sufficient to show the violation of a right in which case the law will presume damage. Thus, in cases of assault, battery, false imprisonment, libel, of trespass on land, and of infringement of patent, the mere wrongful act is actionable without proof of special damage. The Court is bound to award to the plaintiff at least nominal damages if no actual damage is proved. This principle is firmly established by the election case of *Ashby* v. *White* (the vote case).

Damnum sine injuria means an actual and substantial loss without infringement of any legal right. In such a case no action lies. For mere loss in money or money's worth does not of itself constitute legal damage and is not a good ground of action. The most terrible harm may be inflicted by one man on another without legal redress being obtainable. There are many acts which though harmful are not wrongful and give no right of action. The *Gloucester Grammar School* case, in which a rival school was set up next door to the plaintiff's, and *Chasemore* v. *Richards*, in which a millowner who had used underground percolating water for sixty years was held to have no remedy against the defendant who stopped

it by digging a well on his own land, and *Acton* v. *Blundell*, in which a mineowner drained off underground water running into the plaintiff's well, fully illustrate that no action lies for mere damage, however substantial, caused without the breach of some legal right. There are moral wrongs for which the law gives no remedy, though they cause great loss or detriment. Loss or detriment is not a good ground of action unless it is the result of a species of wrong of which the law takes cognizance.

Special damage.—There are, however, some instances of wrongs in which no action lies unless actual or special damage to the plaintiff has been shown. The expression 'special damage' in this connection means the actual and temporal loss which has, in fact, occurred. Special damage must be shown in the following cases :—

(1) Right to support of land as between adjacent landowners.
(2) Menace.
(3) Seduction.
(4) Slander.
(5) Deceit.
(6) Conspiracy or confederation.
(7) Waste.
(8) Distress damage feasant.
(9) Nuisance consisting of damage to property.
(10) Actions to procure persons to break their contracts with other persons.

(3) Legal remedy.—A tort is a civil injury, but all civil injuries are not torts. The wrongful act must come under the category of wrongs for which the remedy is a civil action for damages. Where there is no legal remedy there is no wrong.

Chapter II.

Damage and damages.—'Damage' and 'damages' are not equivalent terms. 'Damages' are the compensation in the form of a sum of money which the Court awards for every injury; but the 'damage' which every injury imports is that which is supposed to be compensated by this award of damages.

Malice.—'Malice' is not essential to the maintenance of an action for tort. It is of two kinds, 'express malice' (or 'malice in fact' or 'actual malice') and 'malice in law' (or implied malice). The first is what is called malice in common acceptation, and means ill-will against a person: the second means a wrongful act done intentionally without just cause or excuse (*Bromage* v. *Prosser*). Where a man has a right to do an act, it is not possible to make his exercise of such right actionable by alleging or proving that his motive in the exercise was spite or malice in the popular sense (*Mogul Steamship Co.* v. *McGregor*, the shipping combine case). An act not otherwise unlawful cannot generally be made actionable by an averment that it was done with evil motive. A malicious motive *per se* does not amount to an *injuria* or legal wrong (*Allen* v. *Flood*, the shipwright case).

Intention.—The obligation to make reparation for damage caused by a wrongful act arises from the fault, and not from the intention. Any invasion of the civil rights of another person is in itself a legal wrong, carrying with it liability to repair its necessary or natural consequences, in so far as these are injurious to the person whose right is infringed, whether the motive which prompted it be good, bad or indifferent (*Allen* v. *Flood*). A thing, which is not a legal injury or wrong, is not made actionable by being done with a bad intent. It is no defence to an actio

in tort for the wrong-doer to plead that he did not intend to cause damage, if damage has resulted owing to an act or omission on his part which is actively or passively the effect of his volition. A want of knowledge of the illegality of his act or omission affords no excuse, except where fraud or malice is the essence of that act or omission. For every man is presumed to intend and to know the natural and ordinary consequences of his acts. This presumption is not rebutted merely by the proof that he did not think of the consequences or hoped or expected that they would not follow. The defendant will be liable for the natural and necessary consequences of his act, whether he in fact contemplated them or not. (*Guille* v. *Swan*, the balloon case; *Scott* v. *Shepherd*, the lighted squib case). The defendant will be liable for the consequences which are the 'direct cause' of his act whether he could have reasonably foreseen them or not (*In re Polemis*, the petrol vapour case).

Personal disability.—There are certain persons who cannot sue in tort owing to personal disability. These are :—

Chapter III.

(1) A convict sentenced to death or penal servitude and who is not lawfully at large under any license. Such a person cannot sue for an injury to his property, but for any personal wrong, such as assault or slander, he can sue. A felon who is sentenced to a term of imprisonment only may sue for torts to his property.

In India, until 1921, certain offences entailed forfeiture of the property of the offender. But forfeiture has now been abolished except in three cases (see ss. 126, 127 and 169, Indian Penal Code). It seems a convict in India may sue for torts both to his person and property.

(2) An alien enemy cannot sue in his own right. He cannot maintain an action unless by virtue of an Order in Council, or duly licensed, or unless he comes into the British dominions under a flag of truce. In British India such a person can sue if permission of the Central Government is obtained (s. 83, Civil Procedure Code).

(3) A wife cannot sue her husband for a tort, nor can a husband his wife, upon the principle that husband and wife form in the eye of the law one person.

The wife may sue her husband for the protection and security of her separate property; but the husband has no such corresponding right against her. A wife cannot sue her husband for his ante-nuptial tort. She cannot sue him for a personal wrong, such as assault, libel, or injury by negligence.

Divorce does not enable the divorced wife to sue her husband for a personal tort committed during coverture. But a wife living apart from her husband under a separation order can maintain an action of libel against him.

(4) A corporation cannot maintain an action for personal wrongs, e.g. libel charging it with corruption, for it is only the individuals, and not the corporation in its corporate capacity, who can be guilty of such an offence. But a corporation may sue for a libel affecting property or business.

(5) A child cannot maintain an action for injuries sustained while *en ventre sa mere*.

(6) An insolvent cannot sue for wrongs affecting his property but he can sue for personal wrongs, such as assault or libel, or seduction of a servant. A right of action in respect of his property passes to the Official Assignee or Receiver for the benefit of his creditors. But a right of action in respect of personal wrongs, such as assault, defamation, seduction remains with the insolvent, and the Official Assignee or Receiver cannot intercept the proceeds so far as they are required for the maintenance of the insolvent or his family. But where a tort causes injury both to the person and property, the right of action will be split and will pass, so far as it relates to the property, to the Official Assignee or Receiver, and will remain in the insolvent so far as it relates to his person.

The following persons cannot be sued in tort :—

(1) An action for a personal wrong will not lie against the Sovereign, for the "King can do no wrong". The King is not answerable personally to his people. This doctrine is based on the constitutional independence of the Crown.

(2) Foreign Sovereigns cannot be sued unless they themselves submit to the jurisdiction of a British Court and waive the privilege. Native Indian Princes of certain status, e.g., H. H. the Gaekwar of Baroda, will be regarded as foreign ruling princes over whom the Court in England has no jurisdiction.

(3) Ambassadors of Foreign Powers, and their families and servants cannot be sued. This privilege may be waived by submitting to the jurisdiction of the Court. Diplomatic privilege does not impart immunity from legal liability, but only exemption from local jurisdiction. The privilege is of the Sovereign by whom the diplomatic agent is accredited, and it may be waived with the sanction of the Sovereign or the official superior of the agent.

(4) Public officials cannot be sued in their representative capacity for torts committed by them or by their subordinates. All great offices of State are emanations from the Crown. They are delegations by the Crown of its own authority to particular individuals. Public officials may be sued in their private capacity for torts committed by them on behalf of or with the authority of the Crown or the Government; and the order of the Crown is no defence to such an action.

Public officials are not personally liable for the wrongs of their subordinates unless expressly authorized or ratified by them; because the subordinates are not their servants. They are both servants of the Crown, and there is no relation of master and servant between the superior officer and his inferior.

(5) Persons who from (*a*) extreme youth, or (*b*) unsoundness of mind, are mentally incapable of contriving fraud or malice.

(*a*) In those cases of tort in which intention, knowledge, malice, or some other condition of the mind of the wrong-doer, forms an essential ingredient of the civil injury complained of, extreme youth may afford a defence which would not be open to an adult wrong-doer or to an infa wrong-doer of a more advanced age. If there is a sufficient maturit understanding in an infant, he will be liable for wrongs of commi.

well as of omission. But if the tort arise out of a contract into which a person is incapable of entering by reason of infancy, such person cannot be liable for the tort (*Jennings* v. *Rundall*, the mare overriding case). He cannot be made liable for a wrong committed in the course of the performance of the contract by changing the action to one of tort. Otherwise, there would be an end of that protection which the law affords to infants. But he would be liable where the tort is merely connected with, but does not properly arise out of, the performance of a *de facto* contract (*Burnard* v. *Haggis*, the mare jumping case). An infant cannot take advantage of his own fraud, i.e. he may be compelled to specific restitution, where it is possible, of anything he has obtained by deceit.

(*b*) Lunacy does not give a general charter to commit wrongs. But a lunatic will not be liable for those torts in which some mental condition of mind forms an essential ingredient, unless the Court be of opinion that he was capable of conceiving such intention. A person sane enough to be accountable to the criminal law would probably be liable for any kind of tort.

Drunkenness is no excuse for the commission of a crime; it will hardly, therefore, excuse a tort.

(6) A corporation cannot be sued, unless—

(*i*) the act done was within the scope of the agent employed by it; and

(*ii*) the act done was within the purpose of the incorporation.

It may thus be liable for assault, false imprisonment, trespass, conversion, libel, or negligence. It was at one time thought that a corporation could not be held liable for wrongs involving malice or fraud on the ground that to support an action for such a wrong it must be shown that the wrong-doer was actuated by a motive in his mind and that "a corporation has no mind". But it is now settled that a corporation is liable for wrongs even of malice or fraud. A corporation therefore may be sued for malicious prosecution or for deceit. A corporation is not liable for any tort of its agents or servants committed in the course of doing an act which is *ultra vires* of the corporation.

(7) At common law a married woman could not be sued unless her husband was joined with her as defendant. The liability was hers, though, living with the husband, it must be enforced in an action against her and him. Strictly speaking, the husband was not liable; his only liability was to be sued jointly with her because of the rule that the wife during coverture could not be either a sole plaintiff or a sole defendant.

Under the Married Women's Property Act, 1882, she could be sued alone for both ante-nuptial and post-nuptial torts, as if she were a *feme sole*, and her husband need not be joined with her as defendant. Any damages or costs recovered against her in any action were payable out of her separate property. But this Act did not affect the common law liability of a husband for his wife's *post-nuptial* torts and consequently a plaintiff had to elect whether he would sue the wife alone or join her husband as co-defendant with her. In respect of her *ante-nuptial* torts she could be sued alone, and sums recovered against her were paid out of her separate

property. But her husband was liable to the extent of the property which he had obtained through her, and he could be sued either jointly with her or alone. The husband's liability terminated with the marriage whether by death or divorce or judicial separation.

In British India there is the Married Women's Property Act, 1874. Under this Act a married woman to whom the Act applies may sue or be sued in tort as a *feme sole*, and any damages recovered by her become her separate property, and any damages recovered against her are payable out of her separate property. This Act does not apply to Hindus, Buddhists, Sikhs, Jains and Mahomedans. Married women of these communities can sue and be sued in respect of their separate property. The husband is neither a proper nor a necessary party to the suit. It would seem that under the Indian law, the husband is not liable for the torts of his wife. The wife may sue her husband for torts to her separate property, and the husband may sue his wife for torts to his property. But neither of them can sue the other for assault, defamation, or other personal wrong.

The Law Reform (Married Women and Tort-feasors) Act, 1935, provides that—

(1) A married woman is liable in respect of any tort and is capable of suing and being sued in tort as if she were a *feme sole* (s. 1).

(2) The husband of a married woman is not liable, *by reason only* of his being her husband, in respect of any tort committed by her, whether before or after the marriage, and cannot be sued or made a party to any legal proceeding in respect of any such tort (s. 3). The position between husband and wife is not affected by the Act.

(8) An action against a trade union or against any members or officials thereof, in respect of any tortious act alleged to have been committed by or on behalf of the trade union shall not be entertained by any Court in virtue of the Trade Disputes Act, 1906. This Act was a great victory for trade unions, who were protected in organizing strikes in breach of existing contracts. The Trade Disputes and Trade Unions Act, 1927, withdraws the protection in the case of a strike which has any object other than the furtherance of a trade dispute.

Under the Indian Trade Unions Act, 1926, a trade union registered under it may be sued in its registered name. A registered trade union and its officers and members are exempted from liability for certain torts.

Chapter IV.

Merger of torts in felony.—It was at one time supposed that there could not be a double proceeding, civil and criminal, in respect of the same act. If the act was a felony, it was said that it 'drowned the particular and private wrong'. This doctrine of the merger of the tort in the felony prevailed for a considerable time. Till 1870, on conviction of felony, the felon's property was forfeited to the Crown, and it was practically useless to bring an action. However, in a very early case it was held that after a successful prosecution for felony an action of trespass might be brought in respect of the same wrong. The rule now is that the private remedy is not merged, but is only suspended until the injured party has performed his public duty, i.e. prosecuted wrong-doer for the crime (*Wells* v. *Abraham* : *Appleby* v. *Franklin*).

principle upon which the rule is founded seems to be that the law shall be vindicated before the individual who is wronged shall be permitted to have recourse to a civil remedy. The sole object of the law is to guard against stifling prosecutions. But the civil remedy is not available to a person who might have prosecuted the wrong-doer for the felony, and has failed to do so. The plaintiff ought to show that—

(1) the felon has actually been prosecuted to conviction (by any one and for any offence); or

(2) the prosecution is impossible; or

(3) he has failed to bring the offender to justice without any fault of his own.

The rule has, however, no application—

(1) To misdemeanours.

(2) Where the plaintiff is not the person injured by the felonious act of the defendant.

(3) Where the defendant is some person other than the person guilty of the crime.

(4) To actions brought under the Fatal Accidents Act, 1846.

It may be remarked that much doubt has been thrown on the correctness of the rule in the cases of *The Midland Insurance Co.* v. *Smith* and *Ex parte Ball*. It has no application in India though in an early case the Calcutta High Court has declared in favour of it.

Foreign torts.—Torts committed in a foreign country are triable in British Courts if they fulfil the following conditions:—

Chapter V.

1. The wrong must be of such a character that it would have been actionable if committed in this country.

2. The act must not have been justifiable by the law of the place where it was committed (*Phillips* v. *Eyre*, the Jamaica Governor's case). The term 'justifiable' has reference to legal justification, and an act or neglect which is neither actionable nor punishable cannot be said to be otherwise than justifiable within the meaning of the rule. It is not necessary that the wrong should have been actionable where committed, it is sufficient if it was unlawful. It is immaterial to consider the remedy that lies by the law of that country.

3. The act complained of must not be a tort of a purely local nature, such as a trespass to land, or a nuisance affecting hereditaments (*Mostyn* v. *Fabrigas*, the Minorca Governor's case).

Defences to an action of tort.—There are certain justifications which when present will prevent an act from being wrongful. These are—

Chapter VI.

(1) Act of State.
(2) Judicial acts.
(3) Executive acts.
(4) Quasi-judicial acts.
(5) Parental and quasi-parental authority.
(6) Authorities of necessity.
(7) Damage incident to authorized acts.
(8) Inevitable accident.
(9) Exercise of common rights.
(10) Leave and license.
(11) Works of necessity.
(12) Private defence.
(13) Plaintiff a wrong-doer.
(14) Acts causing slight harm.

(1) Act of State.—An act of State is an act injurious to the person or to the property of some person who is not at the time of that act a subject of His Majesty, which act is done by any representative of His Majesty's authority, civil or military, and is either previously sanctioned, or subsequently ratified by His Majesty. Thus, this doctrine applies only to acts affecting foreigners. As between the Sovereign and his subjects there can be no such thing as an act of State. An act of State in respect of which the jurisdiction of the Courts is barred must be an act which does not purport to be done under colour of legal title at all, but which must rest for its jurisdiction on considerations of external politics and inter-statal duties and rights, e.g. seizure of territory by the British Government as a sovereign power. The acts of State of which municipal courts in India are debarred from taking cognizance are acts done in the exercise of sovereign powers, which do not profess to be justified by the municipal law. The control and authority exercised by the Government of India as the paramount power over the Native States is outside the jurisdiction of municipal Courts.

Public functionaries.—Except with the sanction of His Majesty in Council, no proceedings shall lie in any Court against the Governor of a Province, and the Secretary of State, in respect of any thing done or omitted to be done by him in performance of the duties of his office. (Government of India Act, 1935, ss. 306, 470).

(2) Judicial acts.—No action lies against a Judge for acts done or words spoken by him in the exercise of his office. This provision of law is for the benefit of the public whose interest it is that Judges should be at liberty to exercise their functions with independence and without fear of consequences. Even if the act done was outside the jurisdiction of the Judge he is not liable unless he knew or ought to have known of his want of jurisdiction. In the case of a Judge of a superior Court the plaintiff has to show that he acted without jurisdiction ; but in the case of a Judge of an inferior Court, the burden of proof lies on the Judge to show that he had jurisdiction.

The same immunity is extended to members of naval and military Courts-Martial and Courts of inquiry, arbitrators, jurymen, and coroners.

Under the Judicial Officers' Protection Act, no Judge, Magistrate, or other person acting judicially, is liable to be sued for an act done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction, provided that he, at the time, in good faith, believed himself to have jurisdiction to do or order the act complained of.

(3) Executive acts.—Valid orders of a public authority form a good defence to a tort committed by its officers in executing them, e.g. orders of a Court of Justice. But if the process is not fair and regular, or if its contents indicate a want of jurisdiction in the Court issuing it, the officer will be responsible. If an officer arrests the body or takes the goods of a wrong person he is liable. If he is misled by a party, he is not.

Under Act XVIII of 1850 (The Judicial Officers' Protection Act) no officer of any Court or other person bound to execute the lawful or orders of a Judge, Magistrate, or other person acting judicially, is

to be sued for the execution of any warrant or order.

Police-officers are protected in the performance of their executive duties by express legislative enactments.

(4) Quasi-judicial acts.—These are acts of universities, colleges, committees, etc. Persons enjoying quasi-judicial powers are protected from civil liability, if they observe the rules of natural justice, and the statutory rules prescribing their course of action. The rules of natural justice are that a man cannot be removed from office of membership unless the persons exercising such powers have—

(1) acted in good faith;

(2) given him a fair and sufficient notice of his offence; and

(3) given him an opportunity of defending himself.

Public authorities even acting within the defined limits of their powers must not conduct themselves arbitrarily or tyrannically. If they abuse their powers, the Court will not allow it.

The above principles apply in the case of expulsion of a member from a club or a caste.

(5) Parental authority.—Parents or persons *in loco parentis* may inflict moderate and reasonable corporal punishment on children. The authority of the schoolmaster is the same as that of a parent; and is not limited to acts committed by the pupil upon the premises of the school but extends to acts done by such pupil while on the way to and from school.

(6) Authorities of necessity.—These are powers arising from necessity, e.g. disciplinary powers or the master of a vessel on the high seas.

(7) Authorized acts.—If the Legislature authorizes the doing of an act no action can be maintained for that act. The person injured by such an act is without a remedy except so far as the Legislature has provided for compensation (*Vaughan* v. *Taff Vale Ry.*, the engine case). Where the Legislature directs that a thing shall at all events be done, the right of action is taken away. If the terms of a statute are not imperative but permissive, the powers conferred by it should be exercised in strict conformity with private rights. Where a discretion is given it must be exercised with due regard to common rights of others (*Metropolitan Asylum District Board* v. *Hill*, the small-pox hospital case). As regards statutory powers in general, the statute will be construed strictly, and, in cases of doubt, in favour of the subject.

(8) Inevitable accident.—An 'inevitable accident' is that which could not possibly be prevented by the exercise of ordinary care, caution and skill. It means an accident physically unavoidable. The accident should not have been capable of being prevented by ordinary skill and diligence. If in the prosecution of a lawful act, casualty, purely accidental, arises, no action can be supported for any injury arising therefrom (*Stanley* v. *Powell*, the pellet case). But if the act done is unlawful an action lies.

(9) Exercise of common right.—The exercise of ordinary rights for a lawful purpose and in a lawful manner is no wrong even if it causes damage. It will be *damnum sine injuria*. Thus, the disturbance or removal

the soil in a man's own land, though it is the means (by percolation) drying up his neighbour's spring or well, does not constitute the invasion a legal right, and will not sustain an action (*Chasemore* v. *Richards* : *cton* v. *Blundell*). Fair competition is in itself no ground of action. ight of competition exists even when the means adopted are unfair. nderselling is not a wrong.

(10) Leave and license.—A man cannot complain of harm to the iances of which he has exposed himself of his free will—*volenti non fit juria*. One who has invited or assented to an act being done towards m cannot, when he suffers from it, complain of it as a wrong. It is ecessary to prove that the person injured knew of the danger, appreciated , and voluntarily took the risk.

The maxim applies, in the first place, to intentional acts which would therwise be tortious. Thus, the surgeon who amputates a limb, and the ootball player, boxer, or fencer are protected. But no consent can legalize n unlawful act, e.g. a kicking match, or a duel.

The maxim applies, in the second place, to consent to run the risk of arm which would otherwise be actionable. The master, on this ground, not liable for injury done to a servant who has undertaken service nowing the risks incidental thereto. The maxim is *volenti non fit injuria* nd not *scienti non fit injuria*. Knowledge is not a conclusive defence in self. But when it is a knowledge under circumstances that leave no nference open but one, namely, that the risk has been voluntarily enountered, the defence is complete. It is necessary to prove that the person njured knew of the risk, and voluntarily took it.

There are limitations to the application of this maxim.—

(1) No consent—no leave or license—can legalise an unlawful act, .g. fighting with naked fists, a kicking match, or a duel with swords.

(2) The maxim has no validity against an action based on a reach of statutory duty.

(3) The maxim does not apply in cases of rescuing. Where the laintiff has, under an exigency caused by the defendant's wrongful misonduct, consciously and deliberately faced a risk, even of death, to rescue nother from imminent danger of personal injury or death, whether the erson endangered is one to whom he owes a duty of protection, or a nember of his family, or is a mere stranger to whom he owes no such pecial duty. (*Haynes* v. *Harwood*, the constable case).

(4) If by a person's wrongful act another is placed in a situation which only leaves him a choice between two perilous courses, the former s liable for the consequences of whichever course the latter takes; the atter's knowledge of the risk run by his taking that course is immaterial.

(11) Works of necessity.—There are many cases in which indiviiduals sustain an injury for which the law gives no action, as where private houses are pulled down to stop a fire, or goods cast overboard to save a ship or the lives of those on board. The welfare of the people is the supreme law—*salus populi suprema lex*, individual welfare shall, in cases of necessity, yield to that of community; and a person's property, liberty and life, shall be placed in jeopardy or even sacrificed for the public good.

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(4) If by a person's wrongful act another is placed in a *situation* which only leaves him a choice between two perilous courses, the *former* is liable for the consequences of whichever course the latter *takes*; *the* latter's *knowledge* of the risk run by his taking that course is *immaterial*.

(11) Works of necessity.—There are many cases in which *individuals* sustain an injury for which the law gives no action, as where *private* houses are pulled down to stop a fire, or goods cast overboard to [illegible] ship or the lives of those on board. The welfare of the *people* is [illegible] supreme law—*salus populi suprema lex*. Individual welfare shall, [illegible] of necessity, yield to that of community; and a person's pro[illegible] and life, shall be placed in jeopardy or even sacrificed fo[illegible]

(12) **Private defence.**—Every person has a right to defend his own person, property, or possession, against an unlawful harm. This may be done for a wife or husband, a parent or child, a master or servant. The force employed must not be out of proportion to the apparent urgency of the occasion. The necessity must be proved.

Every person is entitled to protect his property. But he cannot for this purpose do an act which is injurious to his neighbour.

(13) **Plaintiff a wrong-doer.**—A person is not disabled from recovering damages for an injury caused to him by reason of himself being a wrong-doer, unless some unlawful act or conduct on his own part is connected with the harm suffered by him as part of the same transaction. A trespasser is liable to an action for the injury which he does; but he does not forfeit his right of action for an injury sustained (*Bird* v. *Holbrook*, the spring-gun case).

(14) **Slight harm.**—The law does not take account of trifles—*de minimis non curat lex*. Nothing is a wrong of which a person of ordinary sense and temper would not complain. This principle is also recognized in the Indian Penal Code (s. 95). The maxim does not apply where there is an injury to a legal right.

Chapter VII. **Discharge of torts.**—Right of action for a tort may be discharged by—

(1) Death of parties.
(2) Waiver.
(3) Accord and satisfaction.
(4) Release.
(5) Acquiescence.
(6) Judgment recovered.
(7) Statutes of limitations

(1) **Death of parties.**—At common law if an injury were done either to the person or property of another, for which *damages* only could be recovered in satisfaction, the action died with the person to whom, or by whom, the wrong was done. This was embodied in the maxim *actio personalis moritur cum persona* (a personal right of action dies with the person). A personal action did not survive on the death, either of the person who sustained, or of the person who committed, the wrong. The Law Reform (Miscellaneous Provisions) Act, 1934, has virtually abolished this maxim.

(I) *Death of the person wronged.*

At common law in the case of the *death of the person wronged*, his executors or administrators cannot maintain an action

(1) for personal wrongs committed during his lifetime, such as assault, libel, false imprisonment, negligence not causing his death, seduction; or

(2) for trespass to his goods and chattels, or if damage was done to his real property in the lifetime of the testator; or

(3) for damages for his death. "In a civil Court, the death of a human being could not be complained of as an injury." (*Baker* v. *Bolton*). But if there is an interval between the wrongful act and the death, damages may be recovered for loss of society or services up to the time of death. If a person dies owing to the injury caused by the negligent act of the defendant, his legal representative is entitled to claim damages for the

benefit of his estate for the loss of the deceased's expectation of life (*Rose* v. *Ford*, the motor collision case).

Statutory exceptions.—(*a*) Under the Law Reform (Miscellaneous Provisions) Act, 1934, on the death of any person all causes of action vested in him shall survive for the benefit of his estate: except actions for (1) defamation, (2) seduction, (3) inducing one spouse to leave or remain apart from the other, and (4) claim for damages for adultery (s. 1 (1)). Where a cause of action so survives (1) the damages recoverable shall not include exemplary damages; (2) the damages, where death is caused, shall be calculated without reference to any loss or gain to his estate consequent on his death, except that a sum in respect of funeral expenses may be included (s. 1 (2)).

(*b*) The Fatal Accidents Act (Lord Campbell's Act) enables the executor or administrator of a person whose death is caused by the wrongful act, neglect, or default of another, to bring an action for the benefit of the wife, husband, or child, of the deceased (9 & 10 Vic., c. 93, s. 1).

The parties for whose benefit this right exists should show some appreciable pecuniary damage at the time or *in prospectu*.

(*c*) The Employers' Liability Act empowers the legal personal representatives of a workman who dies of injuries sustained whilst in his employer's service through any of the causes mentioned in the Act to bring an action for compensation against the employer (43 & 44 Vic., c. 42, s. 1).

(*d*) By the Workmen's Compensation Acts, 1925 to 1930, the dependents of a workman can claim compensation where the workman dies from injury which if he had survived would have given him a claim to compensation.

Indian law.—Under s. 306 of the Indian Succession Act, 1925, all rights to prosecute any action existing in favour of a deceased person survive to his executors or administrators, except an action for—

(1) defamation;
(2) assault, as defined in the Indian Penal Code; and
(3) personal injuries not causing the death of the party.

Hence, the application of the maxim *actio personalis moritur cum persona* is confined only to the above three cases.

An action for malicious prosecution survives to the representatives of a deceased plaintiff, according to the Calcutta and Rangoon High Courts; it does not so survive, according to the High Courts of Madras, Bombay, Allahabad and Patna.

Before the Indian Succession Act, 1865, (repealed by the Act of 1925) was passed, there were two statutory exceptions to the maxim—

1. In cases of wrongs which occasioned pecuniary loss to the estate of a deceased person an action could be maintained, under the Legal Representatives' Suits Act (XII of 1855), provided the wrong was committed within one year before his death and the action was brought within one year after his death.

2. Where a person was killed by the wrongful act or neglect of another, an action could be maintained, under the Fatal Accidents Act

(XIII of 1855), for the benefit of the widow, husband, parent, or child, of the deceased by his legal representatives, provided the deceased could have sued for the wrongful act if death had not been caused, and the suit was brought within one year from the date of the death of the deceased (Indian Limitation Act, Art. 21).

(II) *Death of the wrong-doer.*

At common law no action can be maintained against the executors or administrators of a wrong-doer, for torts such as trespass to goods, false imprisonment, assault and battery, malicious prosecution, slander, fraud, or negligence. But where property, or the proceeds or value of property, belonging to another, have been appropriated by the wrong-doer and added to his own estate or moneys, the estate will be liable to the extent to which it has been augmented (*Phillips* v. *Homfray*).

Statutory exception.—Under the Law Reform (Miscellaneous Provisions) Act, 1934, on the death of any person all causes of action subsisting against him shall survive against his estate: except actions for (1) defamation, (2) seduction, (3) inducing one spouse to leave or remain apart from the other, and (4) claim for damages for adultery (s. 1 (1)). No proceedings are maintainable unless—

(1) proceedings were pending against the deceased at the date of his death; or

(2) the cause of action arose not earlier than six months before his death and proceedings are taken not later than six months after his personal representative took out representation (s. 1 (3)).

Where damage has been suffered by reason of any act or omission in respect of which an action would have subsisted against any person if he had not died before or at the same time as the damage was suffered, there shall be deemed to have been subsisting against him before his death such action as would have subsisted if he had died after the damage was suffered (s. 1 (4)).

Indian law.—Under s. 306 of the Indian Succession Act all rights of action existing against a person at the time of his decease survive against his executors or administrators, except an action for—

(1) defamation;
(2) assault, as defined in the Indian Penal Code; and
(3) personal injuries not causing the death of the party.

Under the Legal Representative Suits Act, 1855, an action may be maintained against the executors or administrators or representatives of any deceased person for any wrong committed by him for which he would have been subject to an action.

The wrong should have been committed within one year before his death and the action should have been brought within two years after the committing of the wrong.

(2) Waiver by election.—If a person has several remedies for the same wrong but chooses only one of them, the other remedies are taken to have been waived. Thus if the defendant obtains the plaintiff's money by fraud or other wrong, the plaintiff may sue him in tort or for money

had and received. Similarly, if a man is wrongfully deprived of his goods, which are afterwards sold, he may bring an action for damages for the tort, or he may sue for the price received by the defendant. In such cases the plaintiff must make his election, and once the election is made and judgment obtained, he cannot afterwards bring another action.

(3) Accord and satisfaction.—An accord is an agreement between two or more persons, one of whom has a right of action against the other, that the latter shall render and the former accept something in satisfaction of the right of action. When the agreement is executed, and satisfaction has been made, the arrangement is called accord and satisfaction, and operates as a bar to the right of action.

(4) Release.—A release is the giving or discharging of the right of action which a man has or may have against another man.

(5) *Acquiescence.*—Where a person who knows that he is entitled to enforce a right, neglects to do so for a length of time, the other party may fairly infer that he has waived or abandoned his right. It is an instance of estoppel. The doctrine is founded upon conduct with a knowledge of one's legal rights.

(6) Judgment recovered.—If a wrong is done, and a judgment is recovered in a Court, the judgment is a bar to the original cause of action. No fresh suit can be brought in respect of it. The person injured cannot bring a second action for the same wrong even though it is subsequently found that the damage is much greater than was anticipated when the action was brought. If in an assault a person sustains a broken arm and a broken leg, he must sue for both the injuries in the same action. This is known in the Civil Procedure Code as the principle of *res judicata.*

Where the injury is of a continuing nature, the bringing of an action and the recovery of damages for the perpetration of the original wrong do not prevent the injured party from bringing a fresh action for the continuance of the injury (*Darley Main Colliery Co.* v. *Mitchell,* the subsidence case).

(7) Limitation.—Actions of tort must be brought within the statutory period, otherwise the right to sue is barred.

Chapter VIII.

Liability for other's torts.—A person may be liable in respect of wrongful acts of another in three ways:

I. As having ratified the particular act.

II. As having stood in some relation with the other so as to entail responsibility for the torts committed by that person.

III. As having abetted the tortious acts committed by others.

I. Liability by ratification.—An act done for another by a person not assuming to act for himself but for such other person though without any precedent authority whatever becomes the act of the principal if subsequently ratified by him. The principal is bound by the act, whether it be for his detriment or advantage, to the same extent as by, and with all the consequences which follow from, the same act done by his previous authority. Ratification of a tort by a principal will not, however, free the agent from his responsibility to a third person. But a ratification may

avoid instead of *creating* a liability. *Omnis ratihabitio retrotrahitur et mandato priori aequiparatur* (every ratification is retrospective and is of equal force with a previous command). It should be noted that—

(1) Only such acts bind a principal by subsequent ratification as were done at the time on his behalf. What is done by a person on his own account cannot be effectually adopted by another.

(2) The person ratifying must have full knowledge of its tortious character.

(3) An act which is illegal and void is incapable of ratification.

II. **Liability by relation.**—Liability for a wrongful act arises from the relation existing between—

(A) Master and Servant.
(B) Owner and Independent Contractor.
(C) Principal and Agent.
(D) Company and Director.
(E) Firm and Partner.
(F) Guardian and Ward.

(A) The relation between master and servant gives rise to the liability—

(1) Of a master to third persons.
(2) Of a servant to third persons.
(3) Of a master to his servant.
(4) Of a servant to his master.

(1) **Master's liability to others.**—A master is liable to third persons for every such wrong of his servant as is committed in the course of the service, though no express command or privity of the master be proved (*Barwick* v. *English Joint Stock Bank*). The wrongful act need not be for the master's benefit (*Lloyd* v. *Grace, Smith & Co.*). For torts committed in any matter beyond the scope of the employment, the master is liable only if he has expressly authorized, or subsequently ratified, them. If the true character of the act of the servant be that it was an act of his own, and done in order to effect a purpose of his own, the master is not liable for it.

A master becomes liable for the wrong done by a servant in the course of his employment in the following ways :—

(*i*) The wrong may be the natural consequence of something being done by a servant with ordinary care in execution of the master's specific orders (*Gregory* v. *Piper*, the rubbish case). The master is liable for the natural consequence of his orders, even though he wished to avoid them and desired his servant to avoid them.

(*ii*) The wrong may be due to the servant's want of care in the carrying on of the work or business in which he is employed (*Whatman* v. *Pearson*, the unattended horse case). But if a servant acts in such disobedience to the instruction of his master as to be altogether outside the course of his duty or in such a way as to be on a frolic of his own, then the master is not liable (*William* v. *Jones*, the pipe case ; *Storey* v. *Ashton*, the car-man's deviation case).

(*iii*) The servant's wrong may consist in excess or mistaken execution of a lawful authority. Here it must be shown—

(*a*) that the servant intended to do on behalf of his master something of a kind which he was in fact authorized to do ; and

(*b*) that the act, if done in a proper manner, or under the circumstances erroneously supposed by the servant to exist, would have been lawful (*Bayley* v. *M. & S. L. Ry.*, the pulling out

of carriage case; *Goff* v. *G. N. Ry.*, the mistaken arrest case).

But if the servant does some tortious act which is outside the scope of his authority, or which his master would have had no power to do himself, and has not specially authorized, the master will not be answerable for it (*Poulton* v. *L. N. S. W. Ry.*, the horse fare case; *Edward* v. *L. & N. W. Ry.*, the theft case). For acts which the master has neither authorized in kind nor sanctioned in particular he is not chargeable.

(*iv*) A wilful wrong, such as assault, provided the act is done on the master's behalf and with the intention of serving his purpose (*Limpus* v *London General Omnibus Co.*, the omnibus upsetting case).

Fraud of servant.—A master is answerable for the fraud of his servant acting within the scope of his authority whether the fraud is committed for the benefit of the master or for the benefit of the servant (*Lloyd* v. *Grace, Smith & Co.*). The master, however, is not liable where the servant has used his position to effect the fraud, but had no authority, express or implied, to do the acts in question.

Criminal act of servant.—A master is liable for the criminal act of his servant, provided it is done by the servant in the course of his employment and in the interest of his master.

Delegation of duty.—A person employed for a particular purpose, e.g. a coachman, cannot delegate his duties to another unless there is an exceptionally urgent necessity for doing so.

A master is not responsible for the act of his servant—

(*a*) Where he has temporarily lent the servant to another person. In a general sense he is the servant of the master who lends him, but upon the practical point of responsibility when he is doing the work of and under the orders or control of the other employer to whom he is lent, he is, in the eye of the law, the servant of the latter, and the latter is, in the eye of the law, his employer.

(*b*) Where he has been obliged by law to employ a particular person, e.g. a compulsory pilot.

(*c*) Where the relation between the parties is that of a head of a Government department and an employee in that department, e.g. the Post-master General is not liable for the negligent act of a telegraph cable-repairer.

(2) Servant's liability to others.—A servant is under no liability to third persons in respect of acts of non-feasance or negligence in the performance of his duty, but as regards acts of misfeasance or positive wrong he is liable. Whoever commits a wrong intentionally or ignorantly is liable for it himself, and it is no excuse to urge that he was acting as an agent or servant on behalf of, and for the benefit of, another.

(3) Master's liability to servant.—A master will be liable to his servant for injuries received by him during service, in three ways :—

(*i*) At common law.

(*ii*) Under the Employers' Liability Act, 1880.

(*iii*) Under the Workmen's Compensation Acts, 1925 to 1930, in England, and the Workmen's Compensation Act, 1923, in India

(*i*) According to common law a master is not liable to his servant for injuries received from any ordinary risk of, or incident to, the service, including acts or defaults, of any other person employed in the same service (*Priestly* v. *Fowler*, the thigh case). A servant who undertakes the performance of services for compensation, does, as an implied part of the contract, take upon himself, as between himself and his master, the natural risks and perils incident to the service. The master is not liable if he can show that the servant injured had assented to undertake the risk of injury when he entered the employment. But nothing short of assent would do. Mere knowledge that there was a risk was never a sufficient defence. The maxim governing this doctrine is *volenti non fit injuria* and not *scienti non fit injuria*. Mere knowledge of the danger will not do; there must be an assent on the part of the workman to accept the risk with a full appreciation of its extent, to bring him within the maxim.

If the person occasioning, and the person suffering, the personal injury, are fellow-workmen engaged in a common employment, and under a common master, such master is not responsible for the results of the injury. This is known as the doctrine of common employment. Common employment does not necessarily imply that both servants should be engaged in precisely the *same* or even *similar* acts. All persons engaged under the *same* employer for the purposes of the same business, however different in detail those purposes may be, are fellow-servants in a common employment. The employment must be common in the sense that the safety of the one servant must, in the ordinary and natural course of things, depend on the care and skill of the others. The injured servant and the servant causing injury must be engaged in common employment and must be in the service of a common master. The rule extends even to a person who is only temporarily or for a particular occasion in the service of another; or where a person volunteers to assist the servant of another in his work; or the workmen are not all equal in point of station or authority; or the servant guilty of negligence is a servant of superior authority.

Common law imposes the following duties on a master :—

(*a*) He must provide proper and competent fellow-servants.

(*b*) He must take reasonable care to provide proper appliances and to maintain them in a proper condition.

(*c*) He must take all reasonable precautions to secure the safety of his servants or workmen.

(*d*) He should not be guilty of personal negligence causing injury to servants.

(*ii*) The Employers' Liability Act has so far expanded the employer's responsibility as to make him liable for the negligent act or default of those to whom he has delegated his duties of control and management, and of those whom he has placed in positions of authority over his workmen (see p. 88). Under the Act the employer will be liable to the person employed if the latter meets with an accident in the course of his employment disabling him for a week from earning his wages.

Under this Act it is a valid defence to plead—

(*a*) that the workman has contracted himself out of the rights conferred by the Act, or

(*b*) that he is guilty of contributory negligence, or

(*c*) that he has voluntarily undertaken, with his eyes open, exceptional risks incident to the employment.

In British India there is no legislation analogous to the Employers' Liability Act and consequently the doctrine of common employment fully applies.

(*iii*) The Workmen's Compensation Acts, 1925 to 1930. The Act of 1925 provides for compensation to workmen by employers, in the cases to which the Act extends, for accidental injuries and death. The obligation to compensate is independent of any negligence on the part of the employees or fellow-servants. The Act in effect compels employers to insure their servants against accidental injuries and death. The insurance is not compulsory, but it is obvious that employers could hardly do, having regard to the obligation imposed upon them by the Act, without insuring their workmen against these risks.

Under this Act the workman is in a more favourable position than a stranger. Where a workman sues his employer for injuries sustained by an accident 'arising out of and in the course of his employment', the employer cannot set up the defence of (1) *volenti non fit injuria*, or (2) inevitable accident, or (3) contributory negligence on the part of the workman.

The Indian Act of 1923 is based on the English Act of 1906 which has been superseded by the Act of 1925. Under it if personal injury is caused to a workman by accident arising out of and in the course of his employment, his employer is liable to pay compensation.

(4) Servant's liability to master.—A servant is liable to his master for the consequences of his non-feasances or wrongful omissions. If damages have been recovered from the master by reason of the servant's negligence the master can recover them from the servant.

(B) Independent contractor.—An independent contractor is one who undertakes to produce a given result, without being in any way controlled as to the method by which he attains that result. If such independent contractor is employed to do a lawful act, and in the course of the work he or his servants commit some casual act of wrong or negligence, the employer is not answerable (*Pickard* v. *Smith*). For, he who controls the work is answerable for the workman; the remoter employer who does not control is not answerable. A person employing another is not liable for his collateral negligence unless the relation of master and servant exists between them. The test whether a man employed to do work is a servant or an independent contractor is the question—Does the employer exercise, or has he a right to exercise, control over the workman, and direct him how to do his work? If so, the relation is that of master and servant, and not of owner and independent contractor.

There are five exceptions to the rule that a person employing an independent contractor is not liable for his wrongful acts :—

(1) Where the employer retains his control over the contractor, and personally interferes and makes himself a party to the act which occasions the damage.

(2) Where the thing contracted to be done is itself illegal.

(3) Where a legal or statutory duty is incumbent on the employer to carry out a particular work efficiently, and the contractor either omits or imperfectly performs such duty.

(4) Where the thing contracted to be done, although lawful in itself, is likely, in the ordinary course of events, to damage another's property, unless preventive means are adopted, and the contractor omits to adopt such means, e.g. injury to neighbouring houses by pulling down property.

(5) Under the Workmen's Compensation Act, 1925, if 'undertakers' employ a contractor, such contractor's servants can recover compensation from the 'undertakers'.

(C) **Liability of principal.**—To make a principal responsible for a wrongful act of his agent it is necessary to show—

(1) that it was committed by the agent in the course of his employment, although the principal did not authorize, or justify, or participate in the act, or even if he forbade it or disapproved of it;

(2) that, if the act was beyond the scope of the agency, it must have been expressly authorized by the principal or subsequently ratified by him.

The liability of a principal for the wrongs of his agent is a joint and several liability with the agent. The maxim *respondeat superior* (let the principal be liable) does not render a principal liable for the wrongs of his agent, if the agent has been dealt with as a principal.

Agent's liability.—Agents are classified as (*a*) private, and (*b*) public.

(*a*) Private agents are personally liable to third persons for acts of misfeasance or positive wrongs. For acts of non-feasance or mere omissions of duty, they are not liable to third persons but solely to their principals.

(*b*) Public officers are not responsible for the neglect or misconduct of servants employed by them. Those who commit the wrongful act are liable. They cannot escape their liability on the ground that they acted in obedience to the order of a superior officer or the head of a Government department. The relation between a superior and a subordinate officer is not that of a master and servant. Both of them are fellow-servants of the Crown. If the act complained of is substantially the act of the head himself, he is liable just as an ordinary person. The Government is not responsible in any case, for it does not undertake to guarantee to any person the fidelity of any of the officers or agents whom it employs. The principles of employers' liability do not apply to them.

(D) **Company and directors.**—Companies are liable for the torts committed by their servants in the course of their employment. But the wrongful act complained of should be *intra vires* and not *ultra vires*, and should be done for the company. Directors are personally responsible for any tort which they may themselves commit or direct others to commit, although it may be for the benefit of the company.

(E) **Firm and partner.**—The relation of partners *inter se* is that

of principal and agent, and each partner is therefore liable to third person for the neglect or fraud of his fellow-partner. The neglect or fraud com plained of must have been committed in the ordinary course of the partner ship business; and while a partner is acting within the scope of hi authority, his co-partner's complete innocence is irrelevant. Whether th act of a partner is one done in the course of the business of the firm is question to be determined on the same considerations as those which determine the responsibility of a master for the acts of his servants.

(F) Guardian and ward.—Guardians are not personally liable fo torts committed by their wards. But they can sue for personal injurie to minors under their charge on their behalf.

IV. Liability by abetment.—In actions of wrong, those who abe the tortious acts are equally liable with those who commit them.

Chapter IX. Remedies.—Remedies for torts are of two kinds judicial and extra-judicial.

(1) Judicial remedies are those which are afforded by the act o law, viz., (I) awarding of damages; (II) the granting of injunction; and (III) restitution of property.

(2) Extra-judicial remedies are those which are available to a party in certain cases of torts by his own acts alone, viz. expulsion of a trespasser, re-entry on land, recaption of goods, distress damage feasant, abatement of nuisance.

I. Damages.—Damages are the pecuniary satisfaction which a plaintiff may obtain by success in an action. They are designed not only as a compensation to the injured person, but likewise as a punishment to the guilty to deter him from any such act in the future. The defendant is liable for any damage which is the 'direct' consequence of his unlawful act, whether he intended the consequence or not, and whether he could have reasonably foreseen it or not (*Polemis*' case, the petrol vapour case; *Smith* v. *L. & S. W. Ry.*, the engine fire case; *Scott* v. *Shepherd*, the lighted squib *case*). The rule that a man is only liable for the natural and probable consequences of his act is not approved of in *Polemis*' case, but is again referred to in *Haynes* v. *Harwood* (the constable case). The fact that the damage caused is not the exact kind of damage one would expect is immaterial, so long as the damage is in fact directly traceable to the negligent act. This is, however, subject to the rule that cause and effect must not be too remote.

Remoteness of damage.—Law will permit no damages to be recovered excepting such as are the 'direct' consequences of a wrongful act. *In jure non remota causa sed proxima spectatur* (in law the immediate or proximate, not the remote, cause of any event is regarded). Damage is said to be too remote when the damage and the loss are not, in Lord Campbell's phrase, sufficiently 'concatenated as cause and effect'. Damage will be excluded as too remote—

(1) Where the defendant's act is not the 'direct cause' of the damage sustained by the plaintiff.

(2) When the damage is caused, wholly or principally, by t

act of the plaintiff himself. This is the rule in cases of contributory negligence. (*Glower* v. *L. & S. W. Ry.*, the race-glass case).

(3) When the damage is the wrongful act of an independent third party, such as could not naturally be contemplated as likely to spring from the defendant's conduct.

The principle underlying the maxim *novus actus interveniens* is that there are circumstances when an intervening act of a third person breaks the chain of causation between the wrongful act and the damage sustained by the plaintiff. But if what is relied upon as *novus actus interveniens* is the very kind of thing which is likely to happen if the want of care which is alleged takes place, the maxim is no defence. Damage is recoverable if, despite intervening independent causes, the person guilty of the original wrongful act ought reasonably to have anticipated such interventions and to have foreseen that, if they occurred, the result would be that his wrongful act would lead to mischief. If the defendant by his conduct directly causes or compels a third person to do an act which produces damage to the plaintiff, such damage is not too remote (*Scott* v. *Shepherd*). Where the *novus actus* is caused by an irresponsible actor it does not break the chain of causation. Children generally do not constitute *novus actus* where their action is the result of their mischievous propensities.

(4) Where there comes in the chain of causation the act of a person who is bound by law to decide a matter judicially and independently, the consequences of his decision are too remote from the original wrong which gave him a chance of deciding.

Measure of damages.—The expression 'measure of damages' means the scale of rule by reference to which the amount of damages to be recovered is, in any given case, to be assessed. Damages may rise to almost any amount, or they may dwindle down to a nominal figure.

Kinds of damages.—There are four kinds of damages : contemptuous ; nominal ; substantial ; and exemplary.

(1) Contemptuous damages are awarded when it is considered that an action should never have been brought.

(2) Nominal damages means a sum of money that may be spoken of, but that has no existence in point of quantity, e.g. one anna, one shilling. Nominal damages are awarded where an action was a proper one to bring, but the plaintiff has not suffered any special damage, and does not desire to put money into his pocket. Such damages are given where the purpose of the action is merely to establish a right, e.g. trespass, invasion of a right of easement. Every infringement of a right involves a claim to nominal damages, which may be one shilling or a farthing.

(3) Substantial or ordinary damages are awarded where it is necessary to fairly compensate the plaintiff for the injury he has in fact sustained. The law does not aim at *restitution* but *compensation*, and the true test is, what sum would afford under the circumstances of each particular case, a fair and reasonable compensation to the party wronged for the injury done him. The plaintiff's own estimate is regarded as the maximum limit.

(4) Exemplary damages are awarded wherever the wrong or

injury is of a grievous nature, done with a high hand, or is accompanied with a deliberate intention to injure, or with words of contumely and abuse, e.g. gross defamation, seduction of a man's daughter, malicious prosecution. In such cases the injury done is so grave and of so reprehensible a character that it is next to impossible to measure damages by any strict numerical rule. The object of giving exemplary damages is to make a public example of the defendant to deter all others from the commission of a similar act.

(II) **Injunction.**—In cases of torts a Court interferes by injunction—

(1) To prevent the infringement or disturbance of a right.

(2) For the purpose of better enforcing rights or preventing mischief until such rights have been ascertained.

(3) Where the remedy of damages would be inadequate or practically worthless.

Before granting an injunction the Court must—

(1) be satisfied that the injury which is apprehended will be either continuous, or frequently repeated, or very serious;

(2) consider what relation the damage which would be caused to the plaintiff by refusing the injunction and to the defendant by granting it bears to one another;

(3) consider the interest of third persons in such cases.

(III) Restitution of property.—The restitution is of specific property. Thus a person who is wrongfully dispossessed of immovable property or of specific movable property is entitled to recover the immovable or movable property as the case may be (Specific Relief Act, ss. 9 and 10).

General and special damages.—General damages are such as the law will presume to be the natural or probable consequences of the defendant's acts. They need not be proved by evidence. They arise by inference of law even though no pecuniary loss can be shown. Special damages are such as the law will not infer from the nature of the act complained of. They must be claimed on the pleadings and proved at the trial.

The Court is entitled to take into consideration as special damage the fact that the plaintiff's normal expectation of life has been materially shortened by the injury caused by the negligence of the defendant. (*Flint* v. *Lowell*).

Prospective and continuing damages.—Damages resulting from the same cause of action must be recovered at one and the same time as more than one action will not lie for the same cause of action. If a person is beaten or wounded, if he sues he must sue for all his damages, past, present and future. He cannot maintain an action for a broken arm and subsequently for a broken rib, though he did not know of it when he commenced the action. But if the same wrongful act violates two rights, successive actions may be brought in respect of each of them. If a person sustains two injuries from a blow, one to his person and another to his property, as for instance damage to a watch, he can maintain two actions in respect of the one blow. Similarly, where the cause of action is a continuing one, a fresh cause of action arises every day; and it is o

to the plaintiff to bring fresh actions. A fresh action cannot be brought unless there is both a new unlawful act and fresh damage.

Nervous and mental shocks.—No action will lie for mental shock, suffering, or anxiety unattended by physical injury. Mental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone. However keen and painful an emotion of the mind may be, it can only be measured and proved by physical effects. Damages may be recovered for nervous shock occasioned by fright unaccompanied by any actual impact, provided the fear in which the plaintiff was put by the defendants' wrongful act was such as would naturally be suffered by a person of ordinary courage and temper and lead to the physical effects complained of (*Wilkinson* v. *Downton*, the grey hair case; *Dulieu* v. *White*, the premature birth case).

Damages in contract and in tort.—The measure of damages is the same in tort as in contract, except—

(1) Intention is an essential element in tort in assessing damages, but not in a breach of contract.

(2) In contract damages are only a compensation. In tort to property they are the same. Where an absolute right is infringed, the plaintiff is awarded nominal damages. Where the injury is to the person or feelings, and the facts disclose fraud, malice, or insult, exemplary damages are given: there is no such distinction as nominal or exemplary damages in contract except in an action for breach of promise of marriage.

(3) In tort the pecuniary condition of the wrong-doer is often taken into consideration, not so in contract.

(4) The rule as to remoteness of damage is not the same in actions of tort and of contract. In tort damages are given for consequences of which the defendant had no notice (*The Arpad, Polemis'* case). In the case of a breach of contract the rules in *Hadley* v. *Baxendale* apply.

(5) In contract it is the duty of the plaintiff to take measures to reduce the damages if there is breach. A tort consists in the defendant's failing to do an act which he is bound to do or in doing one which he ought not to do.

Joint tort-feasors.—All persons who aid, counsel, direct, or join in the committal of a wrongful act, are joint tort-feasors.

The joint liability arises in three ways—

(1) Agency, when one person employs another to do an act which turns out to be a tort.

(2) Vicarious liability, i.e. liability arising from relations such as master and servant, husband and wife, guardian and ward.

(3) Joint action. When two or more persons combine together to commit an act which amounts to a tort.

The liability of the wrong-doer in tort is joint and several.

It should be noted that at common law—

(1) Joint tort-feasors may be sued jointly or severally. If sued jointly, the damages may be levied from all or any one of them.

(2) A judgment against one or more of several tort-feasors is a bar to any further action against the other, even though it remains

unsatisfied. Otherwise a vexatious multiplicity of actions would be encouraged.

(3) A release granted to one or more of the several tort-feasors operates as a discharge of the others. But a covenant not to sue one of them is no bar to an action against others.

The Law Reform (Married Women and Tort-feasors) Act, 1935, provides that—

(1) Judgment recovered against one joint tort-feasor is not a bar to action against another joint tort-feasor in respect of the same damage.

(2) If more than one action is brought in respect of that damage against tort-feasors, whether joint or otherwise, the sums recoverable by way of damages shall not in the aggregate exceed the amount of damages awarded in the first action.

(3) The plaintiff in any such subsequent action is not entitled to costs unless the Court thinks there was reasonable ground for the action.

Contribution.—At common law no action for contribution is maintainable by one wrong-doer against another, although the one who seeks contribution may have been compelled to satisfy the full amount of damages (*Merryweather* v. *Nixon*, the mill machinery case). This principle is based on the maxim *ex turpi causa non oritur actio*. But it is confined to cases where the person seeking redress must be presumed to have *known* that he was doing an *unlawful* act. It does not apply—

(1) To cases of negligence, or unintentional breaches of the law.

(2) To cases of indemnity, where one man employs another to do acts, not unlawful, for asserting a right.

(3) Where one party induces another to do an act which is not legally supportable, and yet is not clearly in itself a breach of law.

(4) To admiralty action, in cases of collision.

(5) Between directors or promoters who are jointly and severally liable for misrepresentations contained in a prospectus.

The Law Reform (Married Women and Tort-feasors) Act, 1935, provides that—

(1) A tort-feasor may recover contribution from any other tort-feasor, whether joint or otherwise, liable in respect of the same damage.

(2) A tort-feasor is not entitled to recover contribution from another tort-feasor who is entitled to indemnity from the tort-feasor actually made liable.

(3) The amount of contribution recoverable from a tort-feasor shall be just and equitable having regard to the extent of his responsibility for the damage.

(4) The Court may exempt any person from liability to make contribution or direct that the contribution from any person shall amount to complete indemnity.

Forms of action.—There were three different classes of actions—Real, Personal and Mixed.

In real actions the plaintiff claimed the right to recover lands, tenements, and hereditaments.

In personal actions the plaintiff claimed a debt, or sought to

to the plaintiff to bring fresh actions. A fresh action cannot be brought unless there is both a new unlawful act and fresh damage.

Nervous and mental shocks.—No action will lie for mental shock, suffering, or anxiety unattended by physical injury. Mental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone. However keen and painful an emotion of the mind may be, it can only be measured and proved by physical effects. Damages may be recovered for nervous shock occasioned by fright unaccompanied by any actual impact, provided the fear in which the plaintiff was put by the defendants' wrongful act was such as would naturally be suffered by a person of ordinary courage and temper and lead to the physical effects complained of (*Wilkinson* v. *Downton*, the grey hair case; *Dulieu* v. *White*, the premature birth case).

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(1) Intention is an essential element in tort in assessing damages, but not in a breach of contract.

(2) In contract damages are only a compensation. In tort to property they are the same. Where an absolute right is infringed, the plaintiff is awarded nominal damages. Where the injury is to the person or feelings, and the facts disclose fraud, malice, or insult, exemplary damages are given: there is no such distinction as nominal or exemplary damages in contract except in an action for breach of promise of marriage.

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(2) Vicarious liability, i.e. liability arising from relations such as master and servant, husband and wife, guardian and ward.

(3) Joint action. When two or more persons combine together to commit an act which amounts to a tort.

The liability of the wrong-doer in tort is joint and several.

It should be noted that at common law—

(1) Joint tort-feasors may be sued jointly or severally. If sued jointly, the damages may be levied from all or any one of them.

(2) A judgment against one or more of several tort-feasors is a bar to any further action against the other, even though it remains

unsatisfied. Otherwise a vexatious multiplicity of actions would be encouraged.

(3) A release granted to one or more of the several tort-feasors operates as a discharge of the others. But a covenant not to sue one of them is no bar to an action against others.

The Law Reform (Married Women and Tort-feasors) Act, 1935, provides that—

(1) Judgment recovered against one joint tort-feasor is not a bar to action against another joint tort-feasor in respect of the same damage.

(2) If more than one action is brought in respect of that damage against tort-feasors, whether joint or otherwise, the sums recoverable by way of damages shall not in the aggregate exceed the amount of damages awarded in the first action.

(3) The plaintiff in any such subsequent action is not entitled to costs unless the Court thinks there was reasonable ground for the action.

Contribution.—At common law no action for contribution is maintainable by one wrong-doer against another, although the one who seeks contribution may have been compelled to satisfy the full amount of damages (*Merryweather v. Nixon*, the mill machinery case). This principle is based on the maxim *ex turpi causa non oritur actio.* But it is confined to cases where the person seeking redress must be presumed to have *known* that he was doing an *unlawful* act. It does not apply—

(1) To cases of negligence, or unintentional breaches of the law.

(2) To cases of indemnity, where one man employs another to do acts, not unlawful, for asserting a right.

(3) Where one party induces another to do an act which is not legally supportable, and yet is not clearly in itself a breach of law.

(4) To admiralty action, in cases of collision.

(5) Between directors or promoters who are jointly and severally liable for misrepresentations contained in a prospectus.

The Law Reform (Married Women and Tort-feasors) Act, 1935, provides that—

(1) A tort-feasor may recover contribution from any other tort-feasor, whether joint or otherwise, liable in respect of the same damage.

(2) A tort-feasor is not entitled to recover contribution from another tort-feasor who is entitled to indemnity from the tort-feasor actually made liable.

(3) The amount of contribution recoverable from a tort-feasor shall be just and equitable having regard to the extent of his responsibility for the damage.

(4) The Court may exempt any person from liability to make contribution or direct that the contribution from any person shall amount to complete indemnity.

Forms of action.—There were three different classes of actions—Real, Personal and Mixed.

In real actions the plaintiff claimed the right to recover lands, tenements, and hereditaments.

In personal actions the plaintiff claimed a [illegible] sought to recover

a chattel, or claimed damages for injury done to his person or property.

Mixed actions partook of the nature of both.

Personal actions were: debt, covenant, assumpsit, trespass, trespass on the case, detinue, replevin, and trover. The action of debt, covenant and assumpsit, were remedies available for the settlement of disputes in the nature of contract.

Action of trespass lay in three cases—

(1) Immediate violence to person, e.g. assault, battery, mayhem and false imprisonment.

(2) Dispossession of goods.

(3) Disseizin of land.

The action was styled trespass *quare clausum fregit* because the appropriate writ commanded the defendant to show *quare* why, *fregit* he broke, *clausum*, the close.

Action on the case was given by the second Statute of Westminster, 1285, where a party was sued for damages for any wrong or cause of complaint to which neither *covenant* nor *trespass* would apply. *Action of trespass* was confined, thereafter to malfeasance accompanied by force. But *trespass on the case* came to apply to—

(1) Malfeasances, i.e. tortious acts where there was no force.

(2) Misfeasances, i.e. lawful acts done in a wrongful manner.

(3) Nonfeasances, i.e. failure to perform undertakings.

Detinue was the form of action for the recovery of specific goods wrongfully detained, or their value, and also damages occasioned by their detention.

Replevin was the action to recover specific goods which had either been wrongfully distrained from the plaintiff, or had been wrongfully taken out of his possession.

Action of trover was originally the remedy of the plaintiff to recover damages against the person who had found goods and refused to deliver them up on demand to the plaintiff. In course of time it became the form of action where the plaintiff sought to recover damages from the defendant who had converted the plaintiff's goods to his own use and came to be known as an *action of conversion.*

Torts to Person.

Chapter XI.

An assault is the unlawful laying of hands on another person or an attempt or offer to do a corporal hurt to another, coupled with an apparent present ability and intention to do the act. It is not every threat, when there is no actual personal violence, that constitutes an assault; there must in all cases be the means of carrying the threat into effect (*Stephen* v. *Myers*, the parish meeting case; *Cama* v. *Morgan*). The intention as well as the act makes an assault. Actual contact is not necessary in an assault, though it is in a battery. The holding up a fist or shaking a whip, when near enough to be able to hit, is an assault. If a sword is flourished at such a distance that it would be impossible to hurt any person, it would not be an assault. It is the ability to do harm that is the essence of this wrong. The menacing attitude and hostile purpose go to make the assault unlawful. Mere words

o not amount to an assault. But the words which the party threatening ses at the time may either give to his gestures such a meaning as may ake them amount to an assault, or may prevent them from doing so.

A battery is the actual and unwarrantable striking of another person, r touching him in a rude, angry, revengeful, or insolent manner (*Cole* v. *Turner*), e.g. pouring water on a person, or spitting in his face. It cludes assault; and is mainly distinguished from the latter in the fact hat physical contact is necessary to accomplish it. It does not matter hether the force is applied directly or indirectly to the human body itself r to anything in contact with it; nor whether with the hand or anything eld in it. But every laying on of hands is not battery, for the party's ntention must be considered. Again, consent is not always a defence o battery. Prize-fighters are guilty of battery though the meetings are y consent.

Mayhem is a bodily harm whereby a man is deprived of the use of ny member of his body or of any sense which he can use in fighting to efend himself or annoy his enemy, or by reason of which he is generally nd permanently weakened, e.g. the cutting off or disabling or weakening man's hand or finger, striking out his eye or foretooth, or castrating him, ut not the cutting off his ear or nose.

In all the above wrongs an action will lie without proof of actual amage as they violate the right of person.

Defences.—Assault and battery may be justified in the following ases :—

(1) Self-defence; or in defence of one's wife or husband, children, parents or one's master.

(2) In defence of the possession of a house, or goods and chattels.

(3) To prevent a forcible entry or seizure of chattels.

(4) In exercise of parental or quasi-parental authority, i.e. for he correction of a pupil, child, apprentice or sailor on board a ship.

(5) By leave and license of the party injured.

(6) In the preservation of the public peace.

(7) Duty of lawful arrest by an officer of justice.

(8) Misadventure.

False imprisonment is a total restraint of the liberty of a person, for however short a time, without lawful excuse. To constitute this wrong two things are necessary—

Chapter XII.

(1) The total restraint of the liberty of a person. The detention f the person may be either

(*a*) actual, e.g., laying hands upon a person; or

(*b*) constructive, by mere show of authority, e.g. by an officer elling any one that he is wanted and making him accompany (*Grainger* v. *Hill*).

(2) The detention must be unlawful. The period for which the detention continues is immaterial.

There must be a *total* restraint for some period upon the liberty o another without sufficient legal authority. A *partial* obstruction of will, as the prevention of his going in one direction or in all directi

one, does not constitute an imprisonment (*Bird* v. *Jones*, the regatta case) though compelling him to go in one direction does. There must be such a detention as to limit the plaintiff's freedom of locomotion in *all* directions. If there be one way of escape there is no arrest and no false imprisonment. But detention is justifiable under certain circumstances—

(1) The defendant can show that he acted under a legal and legally executed warrant. If there was no warrant for the arrest, then the law differs according as the defendant is a constable, or a private person.

(2) A constable may arrest any one *suspected* to have committed a felony; or to prevent a breach of the peace.

The English common law right of a private citizen to arrest ceased to apply to India since the enactment of the Indian Penal Code and the Criminal Procedure Code.

Chapter XIII.

Defamation may be committed either by way of writing (or its equivalent), or by way of speech. The term 'libel' is used for the former kind of utterances, and 'slander' for the latter.

A libel is a publication of a false and defamatory statement in permanent form tending to injure the reputation of another person without lawful justification or excuse.

A slander is a false and defamatory verbal statement tending to injure the reputation of another without lawful justification or excuse. By reputation is meant the opinion of the world in general.

Libel differs from slander in several respects—

(1) Libel is addressed to the eye; slander to the ear.

(2) Libel is a criminal offence as well as a civil wrong; slander is a civil wrong only.

(3) In libel the law presumes that the person defamed has suffered damage: slander is actionable only when special damage can be proved to have been its natural consequence, or when it conveys certain imputation.

(4) In libel the defamatory matter is in some permanent form: slander is in its nature transient.

(5) Libel shows greater deliberation and raises a suggestion of malice: slander may be uttered in the heat of the moment and under a sudden provocation.

(6) The actual publisher of a libel may be an innocent person, and, therefore, not liable: in every case of republication of a slander, the publisher acts consciously and voluntarily and must necessarily be guilty.

(7) Under the English statute of limitation an action of libel is barred after six years, but of slander after two. In India the period of limitation is one year for both.

Libel.—To support an action for libel the statement complained of must be—

(1) False.
(2) In writing.
(3) Defamatory.
(4) Published.

(1) The falsity of the charge is presumed in plaintiff's favour. The burden of proof that the words are false does not lie upon the plaintiff. Defamation of a person is taken to be false until it is proved to be true.

(2) The term 'libel' indicates something printed or written, but it includes also any scandalous painting, effigy, or emblem. Defamation through the agency of mechanically reproduced pictures and words, e.g. a talking cinematograph film, constitutes a libel.

(3) Any words will be deemed *defamatory*, which expose the plaintiff to hatred, contempt, ridicule or obloquy, or which tend to injure him in his profession or trade or which cause him to be shunned or avoided by society. It is for the plaintiff to show that the words complained of were understood in a defamatory sense. Where the words are not *prima facie* defamatory, but the plaintiff intends to maintain that they were defamatory by reason of their being understood in a special sense, he must insert an averment called an *innuendo*. The purpose of inserting an *innuendo* is to point out a secondary meaning in which the words are defamatory (see p. 142). An *innuendo* cannot add a fact or enlarge the natural meaning of words. In the absence of an *innuendo*, no evidence can be admitted to prove a special meaning, and the suit will be dismissed. The defamatory words must also refer to some ascertained or ascertainable person, and that person must be the plaintiff. The words must concern the plaintiff, i.e. must affect his character or touch him in the way of his office, profession, or trade (*Capital & Country Bank* v. *Henty*, the run on Bank case). The intention or motive with which the words are used is immaterial. It is not necessary that all the world should understand the libel; it is sufficient if those who knew the plaintiff can make out that he is the person meant.

If the words are false and defamatory the law implies malice.

It is not a tort to defame a deceased person. But the person defaming may be criminally prosecuted if the imputation would have injured the reputation of that person if living, and is intended to be hurtful to the feelings of his family or other near relatives.

(4) As regards *publication*, it may be observed that the making known, knowingly or negligently, of a libel or slander to any person, other than the object of it, is publication in its legal sense. If the statement is sent straight to the person of whom it is written, there is no publication of it. A communication to a husband or wife of a charge against the wife or husband constitutes a sufficient publication on the common law principle that husband and wife are one person. But the uttering of a libel by a husband to his wife is no publication. The plaintiff must prove the publication of the libel by the defendant. Every sale and delivery of a libel is a fresh publication thereof; and each publication gives a fresh cause of action.

If a business communication is privileged, the privilege covers all incidents of the transmission and treatment of that communication which are in accordance with the reasonable and usual course of business, e.g. dictating business letters to a typist even though they contain defamatory statements. Where a document containing defamatory statements is read out to third persons it amounts to slander and not libel.

Slander.—In the case of a slander, in addition to the first, third and fourth requisites which are necessary to be alleged in an action of libel, it must further be shown that some special damage has resulted from th

one, does not constitute an imprisonment (*Bird* v. *Jones*, the regatta case) though compelling him to go in one direction does. There must be such a detention as to limit the plaintiff's freedom of locomotion in *all* directions. If there be one way of escape there is no arrest and no false imprisonment. But detention is justifiable under certain circumstances—

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Slander.—In the case of a slander, in addition to the third fourth requisites which are necessary to be alleged in an it must further be shown that some special damage has

use of the words complained of. Such damage must be the legal and natural consequence of the slander. But an action of slander may be maintained, without proof of special damage, in the following cases:—

(1) If a criminal offence be imputed to the plaintiff. The crime must be one for which corporal punishment may be inflicted, e.g. murder, robbery, perjury, theft, etc. Mere liability to arrest is not sufficient, because arrest is not a punishment.

(2) If a contagious or infectious disorder, tending to exclude the plaintiff from society, be imputed to him.

(3) If any injurious imputation be made, affecting the plaintiff in his office, profession, or trade.

(4) If the plaintiff is a woman or a girl, and the words impute unchastity or adultery to her (Slander of Women Act, 1891).

The common law rule that slander is not actionable *per se* has not been followed in India except in a few decisions. The Indian cases fall under three categories:—

(1) Where the words complained of are words of vulgar abuse.

(2) Where they impute unchastity to a woman.

(3) Where they tend to lower the character of the plaintiff in his caste.

(1) Abuse.—A distinction has been made between abusive language which amounts merely to an insult and abusive language which is both insulting and defamatory. In the former case no action lies (*Girish Chunder* v. *Jatadhari*, the 'sala' case); in the latter, an action lies without proof of special damage (*Parvathi* v. *Mannar*, the unchaste wife case).

(2) Unchastity.—The Calcutta High Court held in a case arising in the town of Calcutta that such words were not actionable in the absence of proof of special damage. In a case coming from the mofussil it held that such an imputation was actionable without proof of special damage. The Madras High Court has, however, held that a suit is maintainable on the Original Side of the High Court without proof of special damage. The Bombay High Court has held that though Parsis are governed by common law, yet words imputing adultery to a Parsi married woman are actionable without proof of special damage as adultery is an offence under the Indian Penal Code (*Hirabai* v. *Dinshaw*, the paramour case).

(3) Caste.—It is actionable without proof of special damage to say of a high caste woman that she belongs to an inferior caste.

Repetition.—Every repetition of defamatory words is a new publication and a distinct cause of action. Tale-bearers are as bad as tale-makers. An action will lie even though the statement complained of was a current rumour and the defendant *bona fide* believed it to be true. If the damage arise simply from the repetition the originator will not be liable, except

(*i*) where the originator had authorized the repetition; or

(*ii*) where an actual duty is cast upon the person to whom the slander is uttered to communicate what he has heard to some third person.

The defences peculiar to an action of libel or slander are:—

(1) Truth. (2) Fair comment. (3) Privilege.

(1) Truth.—The truth of any defamatory words is a complete

defence to an action of libel or slander though it is not so in a criminal trial. For law will not permit a man to recover damages in respect of an injury to character which he either does not, or cught not to, possess. The *onus* of proving the truth of the words complained of lies upon the defendant. It is not necessary for the plaintiff to prove falsehood. If the matter is true the purpose or motive with which it was published is irrelevant. The defendant must show that the imputation made by him was true as a *whole* and in every *material* part thereof. It is enough if the statement though not perfectly accurate is *substantially* true. If there is gross exaggeration the plea of justification will fail. If the statement is false it is no justification that the defendant honestly and on reasonable grounds believed it to be true.

The maxim "the greater the truth, the greater the libel", never had an application to civil actions for damages. In criminal law truth is only a justification if it is shown that the publication was for the public good. According to the Penal Code, it is not enough that the words complained of are true; the defendant must then be prepared to go further and prove that not only are the words true, but that also it is for the public benefit that they should be published.

(2) Fair comment.—A fair and *bona fide* comment on matters of public interest is no libel, however severe in its terms, unless it is written intemperately and maliciously. (For matters which are of public interest, see p. 156). The word 'fair' embraces the meaning of honesty and also relevancy. The view expressed must be honest and such as can fairly be called criticism. The question which should be considered is—would any fair man, however prejudiced he may be, however exaggerated or obstinate his views, have said that which this criticism has said. The comment must be *bona fide* and must not be made a cloak for malice. Legitimate criticism is no tort; should loss ensue to the plaintiff it would be *damnum sine injuria.* But

(*i*) the words published must be fairly relevant to some matter of public interest;

(*ii*) they must be the expression of an opinion, and not the allegation of a fact;

(*iii*) they must not exceed the limits of fair comment; and

(*iv*) they must not be published maliciously.

(3) Privilege.—Where a person stands in such a relation to the facts of the case that he is justified in saying or writing what would be slanderous or libellous in any one else, he is said to have a 'privilege'. Privilege is of two kinds: (1) absolute; and (2) qualified.

A statement is 'absolutely privileged' when no action lies for it even though it is false and defamatory, and made with express malice, e.g. words spoken in Parliament, or in the course of judicial, military, naval or State proceedings. This is based upon the principle that interest of the community overrides the interest of the individual.

A statement is said to have a 'qualified privilege' when no acti lies for it even though it is false and defamatory, unless the plai proves express malice.

'Qualified privilege' is accorded to matters which are not so important to the public as those that are 'absolutely privileged' and the speaker will not be liable if the statement is made *bona fide* and not maliciously. These are (1) communications made (*a*) in the course of legal, social or moral duty, (*b*) for self-protection, (*c*) for protection of common interest, (*d*) for public good; and (2) reports of Parliamentary and judicial proceedings, and proceedings in public meetings.

Difference between 'absolute' and 'qualified' privilege.—

(1) In the case of 'absolute privilege', it is the occasion which is privileged, and when once the nature of the occasion is shown, every communication on that occasion is protected. But in the case of 'qualified privilege', the defendant does not prove privilege until he has shown how that occasion was used. It is not enough to have an interest or duty in making a communication; the interest or duty must be shown to exist in making the communication complained of.

(2) 'Absolute privilege' is not affected by the presence of 'express malice'. A 'qualified privilege' is a privilege rebuttable by proof of 'express malice' on the part of the defendant. The plaintiff must prove that the defendant was actuated by 'malice'.

Absolute privilege.—Absolute privilege attaches to—

(1) Parliamentary proceedings.
(2) Judicial proceedings.
(3) Military or naval proceedings.
(4) State proceedings.

(1) **Parliamentary proceedings.**—Speeches in Parliament are absolutely privileged. But this privilege does not extend to anything said outside the walls of the House, or to a speech printed and privately circulated outside the House. A petition to Parliament, or to a Committee of either House, and statements of witnesses before Parliamentary Select Committees are absolutely privileged.

Under the Parliamentary Papers Act, all reports, papers and proceedings published by either House of Parliament are absolutely privileged.

(2) **Judicial proceedings : Judge.**—No action lies against a Judge of a *superior* Court for words spoken on the bench, even though it be alleged that he spoke maliciously, knowing his words to be false, and also that his words were irrelevant and wholly unwarranted by evidence (*Anderson* v. *Gorrie*). A Judge of an *inferior* Court of Record enjoys the same immunity in this respect as the Judge of a *superior* Court so long as he has *jurisdiction* over the matter before him. A Justice of the Peace, a Coroner, a Receiver, and a Juror, enjoy the same privilege as the Judge of an inferior Court. The statements made by any one of them must be relevant to the inquiry.

The Madras and the Allahabad High Courts have followed the above principle.

Advocate.—No action lies against an advocate for defamatory words spoken with reference to, and in the course of, any inquiry before a judicial tribunal, even if they are uttered by him maliciously, and not with the object of supporting the case of his client, and are uttered without any justification, or even excuse, and from personal ill-will or anger towards the person defamed, and are irrelevant (*Munster* v. *Lamb*).

The Madras High Court has adopted the above view (*Sullivan* v. *Norton*). The Bombay High Court has held that an advocate has the fullest liberty of speech in the course of a trial before a judicial tribunal so long as his language is justified by his instructions, or by evidence, or by proceedings on the record (*Bhaishankar* v. *Wadia*). The Patna High Court has adopted the same view. The Allahabad High Court has held that if a pleader makes a defamatory remark during examination of a witness which is *entirely uncalled for he will be liable.*

Solicitor.—Solicitors acting as advocates have the same privilege as counsel.

Party.—No action lies against a party conducting his own case for statements made in open Court, no matter how false or malicious or irrelevant to the matter in issue the words complained of may have been. (*Royal Aquarium* v. *Parkinson*). The privilege of parties is confined to what they do or say in the conduct of the case.

The Madras High Court has adopted this view. The Lahore High Court has ruled that a remark made by a party, wholly irrelevant to the matter of inquiry and uncalled for by any question of the Court, is not privileged. The Calcutta High Court has not definitely decided this point.

Witness.—A witness in the box is absolutely privileged in answering questions asked him by counsel on either side. For any statement voluntarily made by him he will be protected if it is *relevant* to the matter in issue. But an observation made by a witness before entering or after leaving the box is not privileged.

According to the Bombay High Court no action lies against a witness in respect of words spoken by him in the witness-box. The Calcutta, Allahabad and Madras High Courts have held that statements made by witnesses in the witness box are protected only if they are relevant to the inquiry.

Affidavits.—Affidavits sworn in the course of a judicial proceeding before a Court of *competent jurisdiction*, as well as pleadings, are absolutely privileged even though they contain statements alleged to have been made falsely and maliciously, and without any reasonable or probable cause. *The privilege does not extend to affidavits containing scandalous* matter.

The High Courts of Bombay, Madras and Allahabad have decided that no action lies for statements in pleadings. The Madras High Court has laid down that there is no difference between evidence given in the box and the evidence on affidavit in that they are both absolutely privileged. *The Allahabad High Court has, in a full bench case, held that a* person presenting a petition to a criminal Court is not liable in a civil suit for damages in respect of statements made therein which may be defamatory of the person complained against. The Rangoon High Court is of the same view. The Calcutta High Court, however, is of opinion that such statements are not absolutely privileged; they should be relevant to the inquiry.

(3) Military proceedings.—All acts done in the honest exercise of military or naval authority; reports made in the course of military or

naval duty; and statements, whether false or malicious, made before a military or naval Court-martial are absolutely privileged.

(4) State proceedings.—For reasons of public policy absolute protection is given to every communication relating to State matters made by one minister to another or to the Crown. It is doubtful whether a Government resolution enjoys an absolute privilege or a qualified one.

Qualified privilege.—The plea of qualified privilege attaches to the following cases:—

(1) When circumstances are such as to cast on the defendant the duty of making the communication to a third party. The duty may be legal, social or moral. For instance, a public officer may be under a legal duty to address to another a statement of facts pertinent to a matter which it is his duty to investigate; and he will be protected if he made the statement honestly in the belief of its truth. Communications made in pursuance of a duty owed to society relate to character of servants; confidential matters of a private nature; and information as to crime.

(2) Communications made in self-protection. Here the statements made may be necessary to protect the defendant's private interests; or they may be statements provoked by the plaintiff by any previous attack on the defendant; or they may be statements invited by the plaintiff in answer to any application or inquiry from him.

(3) Communications made in protection of common interest. Every communication made *bona fide* upon any subject-matter, with the object of protecting an interest common to the writer or speaker and the person to whom it is made, is privileged.

The common interest may be in respect of family affairs, money matters, profession, or any right or duty recognized by law. But this privilege is lost if the statement is made to an unnecessarily large number of persons and thus spread broadcast.

(4) Communications made to persons in public position for public good are privileged, e.g. information given for the purpose of redressing grievances or punishing crime or securing public morals.

(5) Fair reports of judicial proceedings, Parliamentary proceedings, and quasi-judicial proceedings.

A fair, *bona fide*, and impartial report of proceedings in any Court of Justice is privileged, except where the matters given in evidence are (*i*) of a grossly scandalous, blasphemous, seditious or immoral tendency, or (*ii*) expressly prohibited by the order of any Court.

A fair and accurate report of any proceedings or debates in either House of Parliament is privileged. Such publication is privileged on the principle that the advantage of publicity to the community at large outweighs any private injury resulting from publication.

The publication of true, accurate and *bona fide* proceedings of quasi-judicial bodies and of public meetings is privileged if it is fair, accurate, and not indecent or blasphemous.

Malicious prosecution is the malicious institution against another of unsuccessful criminal, or bankruptcy or liquidation

Chapter XIV.

proceedings, without reasonable or probable cause. In such an action the plaintiff has to prove—

(1) That he was prosecuted by the defendant.

(2) That the proceedings terminated in his favour if they are capable of such termination. He need not prove acquittal, for a prosecution may be determined in various ways.

There is one exception to the rule that the prosecution must have terminated favourably to the plaintiff, namely, where the proceeding in respect of which the action is brought is *ex parte*. In such a case the result naturally terminates unfavourably to the plaintiff.

(3) *That there was no reasonable or probable cause for the prosecution.*

Reasonable cause is such as would operate on the mind of a discreet man; probable cause is such as would operate on the mind of a reasonable man. The case of *Abrath* v. *North Eastern Ry.* lays down that a defendant will be deemed to have had reasonable and probable cause when

(*a*) *he took care to be informed of the facts*;

(*b*) he honestly believed his allegations to be true; and

(*c*) the facts were such as to constitute a *prima facie* case.

The existence of reasonable and probable cause does not avail if the prosecutor prosecuted in ignorance of it. The dismissal or abandonment of a prosecution does not create any presumption of the absence of reasonable and probable cause nor does an acquittal for want of evidence.

(4) That the prosecution was instituted with a malicious intention, i.e. from an indirect and improper motive, and not in furtherance of justice. It will be sufficient that the party was actuated either by spite or ill-will towards an individual (*Hicks* v. *Faulkner*). From a want of reasonable and probable cause a Court may infer malice, but not *e contra*.

(5) That he has suffered in person, reputation, or pocket, when the proceedings are other than criminal proceedings, e.g. bankruptcy proceedings.

Malicious prosecution is distinguished from false imprisonment :—

(1) Malicious prosecution *is wrongfully setting the criminal law* in motion; false imprisonment is wrongfully restraining the personal liberty of the plaintiff.

(2) *In malicious prosecution the plaintiff must prove the non-exis*tence of reasonable and probable cause; in false imprisonment the onus lies on the defendant of proving its existence, as his justification (*Hicks* v. *Faulkner*).

(3) A person becomes liable to an action for false imprisonment by setting a ministerial officer in motion; but by setting a judicial officer in motion he renders himself liable to an action for malicious prosecution (*Austin* v. *Dowling*).

(4) Malice is an essential ingredient in an action for malicious prosecution; but not in that of false imprisonment.

Malicious civil proceedings.—An action does not lie for maliciously and without reasonable and probable cause instituting an ordinary civ suit; but in respect of a false or vexatious claim, the Court can award

pensatory costs (section 35A of the Civil Procedure Code). Such a suit will lie if there is damage to credit or reputation, or arrest of person, or seizure of property. If a suit is brought on the advice of legal advisers it cannot be said to have been instituted without reasonable or probable cause though the advice proves to be wrong.

Abuse of legal process.—An action lies for putting into force the process of the law maliciously and without any reasonable and probable cause to the prejudice of another's person or property. Termination of the proceedings taken in favour of the plaintiff is essential.

Section 95 of the Code of Civil Procedure also gives a summary remedy to a defendant to get compensation where an arrest or attachment before judgment has been effected or a temporary injunction has been granted :—

(1) if such arrest, attachment or injunction was applied for on insufficient grounds, or

(2) if the plaintiff fails in the suit and there was no reasonable or probable ground for instituting it.

Malicious arrest.—Malicious arrest is wilfully putting the law in motion to effect the arrest of another, under civil process, without reasonable and probable cause. It is not actionable unless it involves interference with liberty.

The plaintiff must show—

(1) that the original action, out of which the injury arose, was decided in his favour;

(2) that the arrest was procured maliciously and without reasonable and probable cause; and

(3) that the damage or injury sustained was something other than an injury which has been, or might have been, compensated for by an award of the costs of suit; that is, he has suffered from collateral wrong.

If a person set the process of a Court in motion and a wrong person is arrested, he is only responsible if he obtained such process fraudulently and improperly. If he truly state the facts and the Judge thereupon does an erroneous act, he is not liable.

Wrongful execution of process.—Where a person maliciously and without reasonable and probable cause, by means of civil proceedings, procures execution or distress against the property of another, an action will lie against him for damages.

A party to a suit is liable, though he acts innocently or mistakenly, if by his order the officer of the Court takes the goods of the wrong person, a stranger in execution. Proof of malice is not necessary when the property of a stranger is taken in execution. But if the Court, after having all the facts as to the right of a defendant to particular movables brought before it, were to order the attachment of specified property or decide as to the right of such attachment, the order would be the act of the Court and the decree-holder would not be liable. If property wrongfully attached is sold, the owner of the property so sold is entitled to sue either for the restoration of the same specifically or for damages.

Obtaining temporary injunction.—A suit for damages for wrongfully obtaining a temporary injunction is maintainable.

Obtaining erroneous decision.—No action lies against any person for procuring an erroneous decision of a Court of Justice. A Court of Justice is not the agent or servant of the litigant who sets it in motion so as to make that litigant responsible for the errors of law or fact which the Court commits.

Costs.—A suit does not lie to recover costs awarded by a civil Court, though it may lie for costs which could not be so awarded.

Chapter XV. Domestic rights.—Wrongs relating to domestic rights relate to the invasion of—

(1) Marital rights.
(2) Parental rights.
(3) Rights to the services of servants.

(1) Marital rights.—Violation of marital rights can take place in three ways—

(*a*) Abduction, or taking away a man's wife.
(*b*) Adultery, or criminal conversation with her.
(*c*) Beating or otherwise abusing her.

(*a*) The common law gives a husband a right of action against any person who takes away his wife by force or fraud. Similarly, he can sue any one who persuades or entices the wife to live separate from him without a sufficient cause. The gist of the action is the loss of the *consortium* of the wife, which term implies an exclusive right against an invader, to her affection, companionship, and aid. *Per quod consortium amisit* (whereby he has lost the benefit of her society) was an allegation used in all such actions.

A wife has a right of action for deprivation of her husband's society. The right of *consortium* is a mutual right of husband and wife, and if any one violated it, either husband or wife could sue for damages for that wrong.

(*b*) For adultery, the common law gave to the husband a writ of trespass *vi et armis* against the adulterer. But this action has been abolished by the Divorce and Matrimonial Causes Act, which enables any husband, either in a petition for dissolution of marriage, or for judicial separation, or in a petition limited to such object only, to claim damages from the adulterer. But a wife cannot bring an action for damages solely in respect of adultery committed with her husband.

(*c*) The common law allows a husband to bring an action for physical injury caused to the wife. If by maltreatment the husband is deprived for any time of the company and assistance of his wife, the common law gives him a separate remedy by an action for damages for such maltreatment. The wife can sue for injury caused to her and the husband for the loss of her society and service (*consortium et servitum*). These two actions may be brought separately or together.

(2) Parental rights.—The common law gives a remedy to pa for the abduction of their children. For injuries to children a rem the parent was developed through a fiction of service due from

parent. Proof of living under their father's roof is sufficient evidence of service.

(3) Rights to service.—Every person who maliciously, or with notice, interrupts the relation subsisting between a master and servant—

(*i*) by procuring the servant to depart from the master's service, or

(*ii*) by harbouring and keeping him as servant after he has quitted it, and during the time stipulated for as the period of service (*Lumley* v. *Gye*; *Bowen* v. *Hall*; *Temperton* v. *Russell*), or

(*iii*) by beating or confining him in such a manner that he is rendered incapable of performing his work,

commits a wrongful act.

Where injury is caused to the servant, the master may maintain an action of *trespass vi et armis*, in which he must allege and prove special damage he has sustained by injuries to his servant (*per quod servitium amisit*). But a master cannot maintain an action against a wrong-doer for injuries causing the immediate death of his servant capable of performing service (*Osborn* v. *Gillet*).

Seduction.—In the case of female children, the father or guardian, and in the case of female servants, the employer, has a right of action for seduction. To support this action two things are necessary—

(1) proof of actual service of some kind, however slight, at the date of seduction; and

(2) the child or servant must have been rendered ill and incapable of rendering service in consequence of the seduction.

In the case of parents the action is based upon a bare fiction of service, and in the case of master upon an actual contract of service. Loss of service must be alleged and proved at the trial, otherwise the plaintiff will fail. In the language of the old writs he sues *per quod servitium amisit* (for that he has lost service). A girl *under* twenty-one is presumed to be in the service of her father or guardian whenever she is not actually in the service of another (*Terry* v. *Hutchinson, Dean* v. *Peel*). Where the girl is *not* under twenty-one, some slight service must be proved, e.g. making tea or milking cows. A *de facto* relation of service is enough, the plaintiff need not prove a binding contract of service. Where the girl is in the service of one man at the time of seduction, and of another at the time of pregnancy and illness, no action lies (*Davies* v. *Williams*). A woman cannot herself maintain any action in respect of her own seduction on account of the maxim *volenti non fit injuria*, she being a consenting party, nor can a mother, if the seduction took place during her husband's lifetime, as she is merged in her husband according to common law.

A person standing in the relation of *loco parentis*, or a putative father, even though he is not married to the girl's mother, can recover damages for an injury of this nature.

In this action the Court generally awards exemplary damages.

Miscellaneous rights: Inducing a breach of contract.—Procuring a breach of contract is an actionable wrong unless there be justification for interfering with the legal right. The justification which will be sufficient

to exonerate a person from liability for his interference with the contractual rights of another must be an equal or superior right in himself, and it will not be sufficient for him to show that he acted *bona fide* or without malice, or in the best interests of himself or others, or on a wrong understanding of his own rights. A violation of legal right committed knowingly is a cause of action, and it is a violation of legal right to interfere with contractual relations recognized by law if there be no sufficient justification for interference (*Quinn* v. *Leathem*). It is sufficient that the breach of contract is induced knowingly and wilfully.

The Trade Disputes Act of 1906 creates an exception to the foregoing principles in cases of trade disputes.

Right to an exclusive office or dignity.—The invasion of an exclusive right to an office or dignity to which emoluments are attached is a ground for an action. No action will, however, lie to vindicate a right, not to an office, but to a mere dignity unconnected with any fees, profits or emoluments.

Wrongful dismissal of servant.—An action can be maintained by a servant who is wrongfully dismissed. Dismissal is justifiable if misconduct on the part of the servant is grave. A Government servant holds office during the pleasure of Government and is liable to be dismissed at any time without notice and without reason assigned. This is subject to statutory exceptions contained in the rules framed under the Government of India Act, 1935.

Torts to Property.

Torts purely affecting real or immovable property are:

1. Trespass.
2. Trespass *ab initio*.
3. Dispossession.
4. Injury to reversionary right.
5. Waste.
6. Injury to natural rights and easements.

1. Trespass to land (trespass *quare clausum fregit*) is the wrongful and unwarrantable entry, upon the land of another or any direct and immediate act of interference with the possession of land.

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It may be committed by

(1) entering upon the land of the plaintiff, or
(2) remaining there, or
(3) doing an act affecting the sole possession of the plaintiff.

To constitute this wrong, neither force nor unlawful intention, nor actual damage, nor the breaking of an enclosure is necessary. Every invasion of private property, be it ever so minute, is a trespass. The question of trespass or no trespass, not the amount of the alleged trespass, is alone material. The plaintiff must establish—

(1) exclusive possession of himself or of his servant, or agent; and
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(2) entry, actual or constructive.

Trespass to land is founded upon possession, not upon title. A apprehended trespass furnishes no ground of action. Trespass by a [illegible] cattle is dealt with similarly to trespass committed by himself.

In respect of a continuous obstruction on land, a fresh action of trespass may be brought *de die in diem*, and recovery in a former action is no defence.

Joint-tenants or tenants-in-common can only sue one another in trespass for acts done by one inconsistent with the rights of the other, e.g. destruction of buildings, carrying away of soil, or expulsion of the other or his servant from the land, or out of the common house.

The person whose land is trespassed upon may—

(1) Bring an action for trespass against the wrong-doer.

The wrong-doer cannot set up *jus tertii* (right of possession outstanding in some third person) as against the fact of possession in the plaintiff.

(2) Forcibly defend his possession against a trespasser.

(3) Forcibly eject him.

But a defendant can plead any of the following defences :—

(1) Prescription.
(2) Leave and license (Indian Easements Act, ss. 51, 55).
(3) Authority of law in execution of legal process, or for levying distress or distress damage feasant.
(4) Act of necessity.
(5) Self-defence.
(6) Re-entry on land.
(7) Re-taking of goods or cattle.
(8) Abating a nuisance.
(9) Special property or easement.

Execution of legal process.—Entry under a legal process is justifiable. An officer executing a legal process cannot break the outer doors but he may break the inner doors after he has entered into a house. The house of every one is to him his castle and fortress as well for his defence against injury and violence, as for his repose. If a person is arrested and then escapes, the officer on a fresh pursuit may break open *any* doors to re-take him. If the officer who has made a lawful entry into a house is forcibly ejected after he has obtained entrance he may break open outer doors to re-enter. Inner doors of the house of a stranger cannot be opened upon suspicion that the defendant is there. Similarly, the officer cannot enter into the house of a stranger on suspicion of finding the defendant's goods. The privilege is accorded only to a dwelling-house or anything attached to it (*Semayne's* case).

Distress is a remedy for the performance of a duty, or the satisfaction of a demand, which consists in the taking of a personal chattel from the possession of the defaulter as a pledge for the performance or satisfaction required. The thing can be sold if the default continues. Distress is one of the most ancient and effectual remedies for the recovery of rent. A landlord may divest himself of this right.

Distress damage feasant.—Distress damage feasant is a remedy by which, if cattle or other things be on a man's land encumbering it or otherwise doing damage there, he may summarily seize them and retain them as a pledge for the redress of the injury he has sustained. Any thing animate or inanimate which is wrongfully on the land of another and is doing damage may be distrained for such damage. This right is founded on the principle of recompense. It can be exercised by a person who has a sufficient possession of land to entitle him to maintain an action of trespass. It does not, however, give any right of sale. The distress must be taken at the time when the damage is done; for, if the damage was

done yesterday and the distress taken to-day, it would be illegal. One may distrain in the night; but a distress for rent can be made during the day only. Distress damage feasant is not allowed against a party having any colour of right.

In India this right does not exist. But the Cattle Trespass Act makes provision regarding the impounding of cattle doing damage.

2. *Trespass ab initio.*—When entry, authority, or license is given to any one by law, and he abuses it, he becomes a trespasser *ab initio*, i.e. the authority or justification is not only determined, but treated as if it had never existed, and he is in the position of a perfect stranger acting without excuse or justification. His misconduct relates back so as to render his original entry tortious. The rule rests upon this, that the subsequent illegality shows the party to have contemplated an illegality all along, so that the whole becomes a trespass. Where authority is not given by law, but by a party, and abused, then the person abusing such authority is not a trespasser *ab initio*. The abuse necessary to render a person trespasser *ab initio* must be a misfeasance and not a non-feasance (*Six Carpenters'* case, the tavern wine case). This doctrine has been applied in modern times to the lord of a manor taking an estray, and to a sheriff remaining in a house in possession of goods taken in execution for an unreasonably long time.

3. Dispossession.—Dispossession or ouster is wrongfully taking possession of land from its rightful owner. The 'dispossession' applies only to cases where the owner of land has, by the act of some person, been deprived altogether of his dominion over the land itself, or the receipt of its profits. A person cannot be dispossessed of immovable property unless he was possessed thereof at the time.

The party dispossessed can bring an action of ejectment to recover possession of the land. It is not finally settled whether *jus tertii* is or is not a good defence to an action of ejectment, but in the following cases it cannot be set up at all—

(1) Landlord and tenant. The landlord need not prove his title but only the termination of the tenancy.

(2) Licensees cannot dispute the title of the persons who licensed them.

There is a conflict of opinion between the High Courts whether the plaintiff in a suit for possession of immovable property is entitled to succeed merely upon proof of previous possession and dispossession or whether he is bound to prove title.

The Bombay, Madras, Allahabad, Patna and Rangoon High Courts have held that possession is a good title against all persons except the rightful owner, and entitles the possessor to maintain an action for ejectment against any person other than such owner who dispossesses him.

The Calcutta High Court has laid down that mere previous possession will not help the possessor except under s. 9 of the Specific Relief which requires him to recover possession if the suit is brought months from the date of dispossession.

The Privy Council has, however, ruled that the plaintiff

for ejectment must recover by the strength of his own title and not on the weakness of his adversary's.

4. **Injuries to reversion.**—Injuries to reversionary interests are done either by strangers or by tenants. Whenever any wrongful act by a stranger is necessarily injurious to the reversion to land, or has actually been injurious to the reversionary interest, the reversioner may sue the wrongdoer. The owner of a life-estate or interest is not allowed to destroy, consume or otherwise permanently impair the *corpus* or substance of the subject-matter, so as thereby to leave it to the remainderman or to the reversioner in a worse state than it would otherwise have been left. The plaintiff suing as reversioner must show that—

(1) by the acts complained of his reversionary estate and interest were depreciated or lessened in value; and

(2) the injury complained of was of a permanent character.

5. Waste is a spoil or destruction in houses, gardens, trees, or other corporeal hereditaments, by a tenant to the dishersion of him that hath the remainder or reversion. The injury to the inheritance must be either by—

(1) materially diminishing the value of the estate; or
(2) changing the character of inheritance; or
(3) increasing the burden upon it; or
(4) impairing the evidence of title.

Waste is either—

(1) Voluntary, which is an offence of commission; or it consists in the active doing of something, as by pulling down houses, doors, and such other fixtures; or

(2) Permissive, which is an offence of omission only, or it consists of a mere passive act, e.g. allowing a house to go to rack and ruin by reason of non-repair as by allowing it to fall for want of repairs.

Action for waste must generally be brought by the person next entitled in remainder, and, if the latter has only a life-estate, he is only entitled to such damages as are commensurate with the injury done to his life-estate. It is no answer to such an action to say that the value of property is enhanced by the changes made. The lessor is entitled to have the premises kept in the state in which he demised them.

In India an action for waste is generally maintained by reversioners against Hindu widows.

6. **Wrongs to easements.**—The most important natural rights and easements relating to property, the invasion of which is treated as wrong, are—

(1) Right to support.
(2) Right to water.
(3) Right to free access of light and air.
(4) Right of way.
(5) Right of privacy.

1. **Right to support.**—Right to support may be of—

(*i*) land by land;
(*ii*) buildings by land;
(*iii*) buildings by buildings; and
(*iv*) land and buildings by water.

(*i*) **Land by land.**—Support of land may be either the *lateral*

support of land by adjacent land; or the *vertical* support of the surface by subsoil, where the property in the two is distinct.

Every proprietor of land is entitled of common right to such an amount *of lateral support from the adjoining land of his neighbour as is* necessary to sustain his own land in its *actual state*, not being weighted by walls or buildings. This is a natural right. This right is not an absolute right; and the infringement of it is not actionable without appreciable damage. A right of support in extension of the natural right may be acquired by prescription or grant.

As regards the right of *vertical support*, the owner of the surface is entitled of common right to the support of the subjacent strata, so that the owner of the subsoil and minerals cannot lawfully remove them, without leaving support sufficient to maintain the surface in its *natural state*. But the owner of the subsoil is not bound to support any buildings, unless the owner of the surface has acquired the right of support for them by grant or prescription. Where the owner of the land grants the subsoil he impliedly grants reasonable means of access to it. The owner of the surface cannot dig holes into the subsoil to a greater extent than is reasonably necessary for the proper and fair use, e.g. cultivation. No right of action lies until some actual damage has been sustained by the owner of the surface. Proof of pecuniary loss is not necessary if actual subsidence is proved. Whenever a fresh subsidence occurs, although proceeding from the original act or omission, a new cause of action accrues in respect of the damage done thereby, and the period of limitation begins to run afresh (*The Darley Main Colliery Co.* v. *Mitchell*).

(*ii*) Buildings by land.—Support of buildings by land may be either by adjacent soil, or by subjacent soil. The natural right to support exists in respect of land only, and not in respect of buildings. If land not expressly granted for building purposes is weighted with buildings, the owner of the surface has no right to additional support necessary for the maintenance of the buildings. If the owner of the subsoil in working mines leaves sufficient support for the surface, but the land sinks in consequence of the weight of the buildings that have been erected on it, the owner of the subsoil is not responsible for the damage done. But if the weight of the building does not cause the sinking of the land, and the land would have fallen in even though the buildings were not in existence, the defendand is liable to the extent of the injury done to *both* land and buildings.

A right to support for buildings may, however, be acquired as an easement by

(1) grant, express or implied; or
(2) prescription (*Angus* v. *Dalton*).

(*iii*) Buildings by buildings.—The right to support of buildings by buildings is not a natural right, but may arise from grant or prescription. Where two houses, erected by different owners, stand in juxtaposition, they in fact stand each on its own ground, and there is no right of support for the one by the other. But the mere fact of contiguity of buildings imposes an obligation on the owners to use due care and in removing one building not to damage the other, even though no

to support has been acquired. If one man builds two or more houses, each needing the support of the other and then if he sells one, it is presumed that he reserves for himself and grants to the buyer the right of mutual support. If he sells several such houses to several persons at different times, each has the same right of support. Damage is necessary to give rise to a right of action.

(*iv*) Land and buildings by water.—An owner of land has no right at common law to the support of subterranean water. The right of vertical support does not extend to have the support of any underground water which may be in the soil so as to prevent the adjoining owner from draining his soil, if for any reason it becomes necessary or convenient for him to do so. But if there is wet sand, or running silt, or natural pitch, instead of water, an action will lie if any subsidence is caused by its removal.

2. Rights to water.—Rights to water relate—

(1) to surface water; and

(2) to subterranean water.

Surface water includes—

(*i*) Natural watercourses or streams.

(*ii*) Artificial watercourses.

(*iii*) Water not flowing in any definite channel.

Subterranean water includes—

(*i*) Subterranean streams the courses of which are well known and clearly defined.

(*ii*) Subterranean streams the courses of which are undefined.

(*iii*) Percolating water the course of which is underground, undefined, and unknown.

(*i*) Natural streams.—A natural stream is one which arises at its source from natural causes, and flows in a natural channel. Every landowner has a natural right to the uninterrupted flow, without diminution, deterioration in quality, or alteration, of the water of natural surface streams which pass to his land in defined channels, and to transmit the water to the land of other persons in its accustomed course. Riparian owners are entitled to use and consume the water of the stream for drinking and household purposes, for watering their cattle, for irrigating their land, and for purposes of manufacture; subject to the conditions that—

(1) the use is reasonable;

(2) it is required for their purposes as owners of the land; and

(3) it does not destroy or render useless, or materially diminish, or affect the application of the water by riparian owners below the stream in the exercise either of natural right or their right of easement if any.

A right to pollute a natural stream may be acquired by grant or prescription. If the rights of a riparian proprietor are interfered with he may maintain an action even though he has suffered no actual loss.

(*ii*) An artificial stream is one that arises by the agency of man, or though arising from natural causes, flows in a channel made by man. The law governing artificial watercourses depends upon whether they are of a *permanent* or *temporary* character, and upon the circumstances under

which they are created. If an artificial stream is *permanent* in its character, a right to an uninterrupted flow of water may be acquired by prescription or grant against both the originator of the stream, and also against any person over whose land the water flows. If it is of a *temporary* character, no right could be acquired by prescription.

(*iii*) The right to surface water standing on the soil, or not running in a defined channel, is in the owner of the soil. It is the natural right of every owner of land to collect and retain all water on the surface which does not pass in a defined channel. He may also allow it to flow away in the usual course of nature upon the lower lands of his neighbour and is not bound to prevent it from so doing. He cannot do this, however, by an artificial discharge upon his neighbour's land unless he has acquired an easement which his neighbour is bound to submit to.

An owner of land on a lower level to which surface water from adjacent land on a higher level naturally flows is not entitled to deal with his lands so as to obstruct the flow of water from the higher land. This principle applies to all lands whether situate in the country or in towns.

(*i*) Subterranean water.—The law as to a subterranean stream, the course of which is well known and clearly defined, is similar to that of natural streams flowing above ground.

(*ii*) and (*iii*). The principles applying to a subterranean stream, the course of which is well known and undefined, and of percolating water in an unknown course, are the same. There is no natural right to the uninterrupted flow of such streams. Such a right can neither be acquired by prescription, though it may be acquired by express grant. The right of an owner of land to divert or appropriate the percolating water within his own land is the same whether his motive be to improve his land or to maliciously injure his neighbour (*Corporation of Bradford* v. *Pickles*). But (1) he is not entitled to pollute water flowing also beneath another's land; and (2) he will be restrained from drawing off underground water from his neighbour's land, if, in doing so, he abstracts water which has once flowed in a defined surface channel.

3. Right to air and light.—Every owner of land has a natural and common law right that the air which passes over his land shall not be polluted by other persons, and any person who pollutes it is guilty of a wrongful act. The right to air is co-extensive with the right to light.

An owner of land or buildings has no natural right to the free passage of air over open adjoining land, e.g. passage of air to an ancient windmill or chimney. Access and use of air to and for any building may be acquired by—

(*a*) grant, express or implied;
(*b*) covenant;
(*c*) custom; and
(*d*) prescription.

Where such a right to uninterrupted air is acquired, an infringement of it will give rise to an action. The owner of a house cannot by prescription claim to be entitled to the free and uninterrupted passage of a current of wind. He can claim no more air than what is sufficient for sanitary purposes. The right to the purity of air is not violated unless the ance is such as materially to interfere with the ordinary comfort of h existence.

Light.—An owner of ancient lights is entitled to sufficient light according to the ordinary notions of mankind, for the comfortable use and enjoyment of his house as a dwelling-house, if it is a dwelling-house, or for the beneficial use and occupation of the house, if it is a warehouse, a shop or other place of business.

The right to light is a right to be protected against a particular form of nuisance. It may be acquired by—

(*a*) grant or covenant, express or implied;
(*b*) prescription; and
(*c*) reservation on the sale of the servient tenement.

To constitute an actionable obstruction of ancient lights there must be a substantial privation of light, enough to render the occupation of the house uncomfortable according to the ordinary notions of mankind, and, in the case of business premises, to prevent the plaintiff from carrying on his business as benefically as before (*Colls* v. *Home and Colonial Stores*, the forty-two feet high building case).

No alteration in the dominant tenement will destroy the right to light. The real test is identity of light and not identity of aperture or entrance for the light. The right to a special amount of light necessary for a particular business cannot be acquired by prescription.

The 45 degree rule.—A building is not supposed to constitute a material obstruction in the eye of the law if its elevation subtended an angle not exceeding 45 degrees at the base of the light alleged to be obstructed, or, in other words, when opposite to ancient lights a wall is built not higher than the distance between that wall and the ancient lights. This rule is not applicable to every case but is used as *prima facie* evidence (*Colls*' case), Though not a positive rule of law it is circumstance which the Courts have taken into consideration in India.

4. Right of way.—A person commits a wrong who disturbs the enjoyment of a right of way by blocking it up permanently or temporarily, or by otherwise preventing the free use of it. But a private person cannot bring an action for obstruction to a public way without showing any particular or special inconvenience or injury to himself beyond that suffered by any member of the public. Such special damage must differ not merely in degree but in kind from that sustained by the rest of the public.

The Madras High Court has laid down in a full bench case that a person or body of persons who claim a right to go in procession along a public way can bring a suit to establish that right against a person who threatens to obstruct it without allegation or proof of special damage. This view has been upheld by the Privy Council.

Rights of way are never given by law to owners of land, but they are discontinuous easements, and may be acquired by—

(*a*) grant; (*c*) necessity; or
(*b*) immemorial custom; (*d*) prescription.

In the case of an obstruction to a private way, proof of special damage is not

5. Ri .—Invasion of a window is not an act glish law takes act. But under the ts Act such of a

local custom. It has been recognized in Gujarat, the United Provinces the Punjab and Bengal, but not in Patna and Madras.

6. Right of prospect.—A right of prospect does not exist at common law nor can it be acquired by prescription.

Torts affecting personalty or movable property are—Chapter XVII.

1. Trespass to goods.	3. Conversion.
2. Trespass *ab initio*.	4. Detention.

Trespass to goods (trespass *de bonis asportatis*) lies wherever there has been an actual taking of, or direct and immediate injury to, another person's goods. An action for trespass will also lie for taking or injuring domiciled and tame animals. It is immaterial whether the injury is caused by the defendant or by an animal belonging to him. The plaintiff must show—

(1) That he was in possession, actual or constructive, of the goods. There is a constructive possession of goods in all cases where there is a legal right to possess.

(2) That his possession has been wrongfully disturbed.

The fact that the trespass was unintentional is no ground of defence.

A joint-owner can maintain an action of trespass against his co-owner if the latter has done some act inconsistent with the joint ownership, except when

(1) the chattels have been completely destroyed, and

(2) there has been a sale of the chattels in market overt.

The defences to an action of trespass are ; —

(1) Self-defence or defence to property.

(2) Exercise of one's absolute or relative rights.

(3) Obedience to some legal or personal authority.

(4) Negligent or wrongful act of the plaintiff himself.

(5) Recaption of goods.

(6) The defence of *jus tertii* can be set up against a plaintiff who has himself neither actual nor constructive possession of the chattels. .

Conversion is the wrongful taking, or using, or destroying of the goods, or an exercise of dominion over them inconsistent with the title of the owner. An act of conversion may be committed—

(1) When the property is wrongfully taken. The taking need not be with the intention of acquiring a full ownership. It is enough if any interest is claimed inconsistent with the right of the person entitled. The taking may be constructive merely, but a taking unaccompanied by an intention to exercise permanent or temporary dominion is not conversion. Actually dealing with another's goods as owner, for however short a time, under a mistaken supposition of being lawfully entitled, or even with the intention of benefiting the true owner, would amount to conversion.

(2) When the property is wrongfully parted with. If a man hands over goods to another so as to give him some right over the property itself, whether as owner or *dominus pro tempore*, it amounts to conversion. Mi

Light.—An owner of ancient lights is entitled to sufficient light according to the ordinary notions of mankind, for the comfortable use and enjoyment of his house as a dwelling-house, if it is a dwelling-house, or for the beneficial use and occupation of the house, if it is a warehouse, a shop or other place of business.

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The Madras High Court has laid down in a full bench case that a person or body of persons who claim a right to go in procession along a public way can bring a suit to establish that right against a person who threatens to obstruct it without allegation or proof of special damage. This view has been upheld by the Privy Council.

Rights of way are never given by law to owners of land, but they are discontinuous easements, and may be acquired by—

(a) grant ;
(b) immemorial custom ;
(c) necessity ; or
(d) prescription.

In the case of an obstruction to a private right of way, proof of special damage is not material.

5. Right of privacy.—Invasion of privacy by opening a window is not an act of which the English law takes cognizance as a wrongful act. But under the Indian Easements Act such right is acquired in virtue of a

local custom. It has been recognized in Gujarat, the United Provinces, the Punjab and Bengal, but not in Patna and Madras.

6. Right of prospect.—A right of prospect does not exist at common law nor can it be acquired by prescription.

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(1) That he was in possession, actual or constructive, of the goods. There is a constructive possession of goods in all cases where there is a legal right to possess.

(2) That his possession has been wrongfully disturbed.

The fact that the trespass was unintentional is no ground of defence.

A joint-owner can maintain an action of trespass against his co-owner if the latter has done some act inconsistent with the joint ownership, except when

(1) the chattels have been completely destroyed, and

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The defences to an action of trespass are:—

(1) Self-defence or defence to property.

(2) Exercise of one's absolute or relative rights.

(3) Obedience to some legal or personal authority.

(4) Negligent or wrongful act of the plaintiff himself.

(5) Recaption of goods.

(6) The defence of *jus tertii* can be set up against a plaintiff who has himself neither actual nor constructive possession of the chattels.

Conversion is the wrongful taking, or using, or destroying of the goods, or an exercise of dominion over them inconsistent with the title of the owner. An act of conversion may be committed—

(1) When the property is wrongfully taken. The taking need not be with the intention of acquiring a full ownership. It is enough if any interest is claimed inconsistent with the right of the person entitled. The taking may be constructive merely, but a taking unaccompanied by an intention to exercise permanent or temporary dominion is not conversion. Actually dealing with another's goods as owner, for however short a time, under a mistaken supposition of being lawfully entitled, or even with the intention of benefiting the true owner, would amount to conversion.

(2) When the property is wrongfully parted with. If a man h over goods to another so as to give him some right over the whether as owner or *dominus pro tempore*, it amounts to

delivery by a carrier will amount to conversion.

(3) When the property is wrongfully sold although not delivered. In *market overt* the property passes to the purchaser by sale, which is therefore equivalent to physical destruction.

(4) When the property is wrongfully retained. The plaintiff must prove that the defendant having it in his *possession* refused to give it up on demand made by him (*Armory* v. *Delamirie*, the jewel case). The *demand* as well as the *refusal* should be unconditional in their terms. A demand and refusal do not in themselves constitute the conversion. They are evidence of a conversion at some previous period. An unqualified refusal is always conclusive evidence of conversion, though not a qualified, reasonable, and justifiable refusal.

(5) When the property is wrongfully destroyed. Every wilful and wrongful destruction of a chattel, or wilful and wrongful damage to it, whereby the owner is deprived of the use of it in its original state is a conversion of it, e.g. taking wine from a cask and filling it with water.

(6) When there is denial of the lawful owner's right. There may be conversion of goods even though the defendant has never been in physical possession of them, if his act amounts to an absolute denial and repudiation of the plaintiff's right.

In all the above six cases the defendant's ignorance of the unauthorized character of his act cannot always be relied upon as a defence. But to maintain an action for conversion, the plaintiff should have a right of property in the thing converted and also a right of possession.

The defendant can plead any of the following defences :—

(1) Lien, either general or particular.
(2) Right of stoppage in transit.
(3) Denial of plaintiff's right to property.
(4) Sale in market overt. The purchaser in such a case cannot be sued for conversion though the seller can be. In India the principle laid down in s. 108 of the Indian Contract Act will apply where a person sells goods to which he has no title.

Trespass differs from conversion—

(1) Trespass is a wrong to the actual possessor and cannot be committed by a person in possession. Conversion is a wrong to the person entitled to immediate possession.

(2) Trespass consists in damaging or meddling with the chattel of another without intending to exercise adverse possession over it. Conversion is a breach, made adversely, in the continuity of the owner's dominion over the chattel, though it may not be hurt.

(3) In trespass the gist of action is the force and direct injury inflicted, in conversion it is the deprivation of the use.

Detention is the adverse withholding of the goods of another. The remedy is an action of *detinue*. This action lies for the specific recovery of chattels wrongfully detained by the party sued, or by his servants or agents, from the person entitled to the possession of them, and also for the damage occasioned by the wrongful detainer. It is immaterial whether the goods were obtained by the defendant by lawful means, as by a bail-

ment or finding, or by a wrongful act, as a trespass or conversion. The injury complained of is not the taking, nor the misuse and appropriation of goods, but only the detention. The plaintiff must show—

(1) a special and general property in the goods; and
(2) a right to the immediate possession of them.

There should be evidence of a request on the part of the plaintiff to have the goods delivered to him, and of a refusal to deliver on the part of the defendant. But the defendant can plead [illegible] on the goods. Detinue does not substantially differ from conversion by detention.

Torts affecting movable as well as immovable property

These are—

(1) Slander of title.
(2) Slander of goods.
(3) Maintenance.
(4) Champerty.

Slander of title consists of a false and malicious statement in writing, printing, or by word of mouth, injurious to any person's title to property, whether movable or immovable, and causing special damage to such person. The plaintiff must prove:

Chapter XVIII.

(1) That the statement is false. It is for the plaintiff to prove it to be so, not for the defendant to prove it to be true.

(2) That the statement was made *mala fide* and was malicious. There must be express or implied malice. If the statement is made in the *bona fide* assertion of the defendant's own right, real or supposed, to the property, no action lies.

(3) That the statement goes to defeat his title to property, which may be either real or personal, and the plaintiff's interest therein may be either in possession or reversion.

(4) That special damage has resulted from the slander (*Malachy* v. *Soper*, the silver-mine case). Such special damage must also be the natural and reasonable consequence of the words used.

An action for slander of title differs from an action for defamation in several respects : see p. 265.

Slander of goods consists of a false statement, disparaging a man's goods, published maliciously, and causing him special damage. This is also known as 'trade libel'. It is not actionable for a man to unduly puff his own goods, or to advertise that he can make as good articles as any other person in the trade. To maintain an action for slander of goods it is necessary to prove—

(1) That the defendant disparaged the plaintiff's goods.
(2) That such disparagement was false.
(3) That it was made maliciously.
(4) That special damage had resulted thereby (*White* v. *Mellin*, the infant's food case; *Ratcliffe* v. *Evans*, the boiler-maker's case).

It is not necessary to prove actual malice, it is sufficient if the statement is made without reasonable cause.

Maintenance is the officious assistance by money or otherwise fered by a third person to either party to a suit, in which he [illegible]

legal interest, to enable them to prosecute or defend it. Where a person agrees to maintain a suit in which he has no interest, the proceeding is known as *maintenance*: where he bargains for a share of the result to be ultimately decreed in a suit in consideration of assisting in its maintenance, it is styled *champerty*. Every champerty is maintenance, but every maintenance is not champerty; for champerty is but a species of maintenance, which is the genus. Both these tend to encourage litigation which is not *bona fide* but speculative.

The law of maintenance is confined to cases where a man improperly, and for the purpose of stirring up litigation and strife, encourages others to bring actions, or to make defences, which they have no right to make. Malice is said to be of the essence of the action, but the law will imply malice upon proof of officious assistance (*Bradlaugh* v. *Newdgate*, the oath case). But the maintainer can justify himself either by showing—

(1) that he had a common interest in the action with the party maintained, e.g. master for a servant or *vice versa*; an heir, a brother, a son-in-law, a fellow-commoner if defending right of common, a landlord defending his tenant in a suit for title, or

(2) that he was actuated (*a*) by motives of charity, *bona fide* believing that the person maintained was a poor man oppressed by a rich one, or (*b*) by religious sympathy.

An action for damages for maintenance will not lie in the absence of proof of special damage.

The doctrine does not apply to criminal proceedings.

Indian law.—The English law of maintenance and champerty is not in force in India. A fair agreement to supply money to carry on a suit, in consideration of the lender's having a share of the property sued for, if recovered, is not opposed to public policy and therefore not void.

Two circumstances must exist—

(1) The agreement should not be extortionate and unconscionable so as to be inequitable against the borrower.

(2) It should have been made with the *bona fide* object of assisting a claim and not for the purpose of gambling in litigation or of injuring others (*Ram Coomar* v. *Chunder Canto*; *Raja Mohkam* v. *Raja Rupsingh*; *Raghunath* v. *Nilkanth*).

A conspiracy is an unlawful combination of two or more persons to do that which is contrary to law, or to do that which is wrongful and harmful towards another person, or to carry out an object not in itself unlawful by unlawful means. A conspiracy to injure differs widely from an invasion of civil rights by a single individual because a number of things not in themselves unlawful if done separately may with conspiracy become dangerous and alarming. Numbers may annoy and coerce where one may not. The mere act of conspiracy is not the subject of a civil action. There must be—

(1) some act in pursuance of the conspiracy; and

(2) actual damage to the plaintiff. It is the damage wrongfully done, and not the conspiracy, that is the gist of action (*Gregory* v. *Brunswick*, the hissing case).

No action for conspiracy lies against persons who act in concert to damage another and do damage him, but who at the same time merely exercise their own rights by lawful means and who infringe no rights of other people, e.g. an act done for the purpose of protecting and extending trade (*Mogul Steamship Co.* v. *McGregor*, the shipping combine case). But a combination, not in pursuit of trade interests, but in pursuit merely of malicious purpose to injure another would be clearly unlawful, and, if an injury has resulted, an action lies, e.g. a combination without justification or excuse to injure a man in his trade by inducing his customers or servants to break their contracts with him, or not to deal with him or continue in his employment (*Quinn* v. *Leathem*). The effect of *Quinn* v. *Leathem* is nullified, so far as trade unions are concerned, by the Trade Disputes Act, 1906.

Sorrell v. *Smith* lays down: (1) a combination of two or more persons wilfully to injure a man in his trade is unlawful, and, if it results in damage to him, is actionable. (2) If the real purpose of the combination is not to injure another, but to forward or defend the trade of those who enter into it, then no wrong is committed and no action will lie, although damage to another ensues, provided that the purpose is not effected by unlawful means. A threat to effect a purpose which is in itself lawful gives no right of action to the person thereby injured.

In the *Mogul Steamship* case what the combination did was done in the way of commercial competition. In *Allen* v. *Flood* the conduct of the defendant was not actionable as his object was to promote his own trade interest however malicious or bad his motive might have been. In *Quinn* v. *Leathem* there was a deliberate intention to injure. In *Sorrell's* case as well as in *Thorne's* case the essential features were the absence of an intent to injure and the presence of the purpose to promote legitimate trade interests.

Torts to incorporeal personal property.

Chapter XIX.

A patent right is a privilege granted by the Crown to the first inventor of any new manufacture or invention, that he and his licensees shall have the sole right, during the term of fourteen years, of making and vending such manufacture or invention. The patentee must be the true and first inventor. The two features necessary to the validity of a patent are novelty and utility. Novelty is essential, for otherwise there would be no benefit given to the public and consequently no consideration moving from the patentee.

A patent privilege may be infringed if any person without the licence of the patentee, makes, uses, exercises or vends the invention within the prescribed limits. The Indian Patents and Designs Act, 1911, governs suits relating to patents.

Where a patent right is infringed, the patentee may claim either (1) an account of profits made by the wrong-doer, or (2) damages for loss caused by the wrong-doer by selling goods similar to his own. It is no valid defence to urge that the defendant did not know of the grant of the patent, or that he had no intention of infringing it. The Court will i[illegible] fere by interlocutory injunction in support of a patent right in [illegible]

cases.

A copyright is the sole and exclusive right of printing or otherwise multiplying copies of any book.

For a book to be capable of protection as copyright it is necessary that it must be—

(*i*) innocent, i.e. it must not be seditious, or libellous, or immoral, or blasphemous or fraudulent;

(*ii*) of literary value; and

(*iii*) original. What is the precise amount of knowledge, labour, judgment or literary skill which an author must bestow upon his book or composition in order to acquire copyright in it cannot be stated in exact terms. Every case will depend on its facts.

If a man illegitimately appropriates the fruits of another's literary labour, he commits literary larceny.

The common law principles governing copyright are abrogated by the Copyright Act of 1911 in England, and by the Copyright Act of 1914 in India.

Trade-mark.—A mark used for denoting that goods are the manufacture or merchandise of a particular person is called a trade-mark. The use of a mark so similar as to *lead*, or *likely to lead*, purchasers to buy the goods marked therewith under the impression that they are the goods of the original manufacturer whose mark they bear, is an infringement of that mark. It is only when the use of the name *deceives* or is reasonably *likely to deceive* the public, that it can be interfered with or prevented. It is not enough to show a *mere possibility* of deception. There must be a *reasonable probability* of purchasers being deceived. The test is the impression likely to be produced on the casual and unwary customers (*Singer's* case). Actual physical resemblance of the two marks is not necessary. It is enough if one of the designs is an obvious imitation of the other. For the purposes of a civil remedy, the invasion is none the less, though the false trade-mark is used unwittingly or innocently.

A distinctive mark may be adopted by a person who is not the manufacturer, but the importer of goods manufactured by another. He can claim to protect his mark even as against the manufacturer. A salesman on commission may be the proprietor of a trade-mark in respect of the goods which he sells on commission.

Property in a trade-mark cannot be acquired until the vendible article is put upon the market, for no property can be acquired except through the process of sale, or offering for sale, in the market.

Trade-mark denotes the manufacture or quality of the goods to which it is attached: property-mark denotes the ownership of them.

The law as to trade-marks is now contained in the Trade-marks Acts, 1905 to 1919. All marks which are trade-marks can be registered under the Act. A registered trade-mark becomes a species of incorporeal right similar to a patent or copyright. Unregistered trade-marks are protected in "passing-off" actions. The gist of a passing-off action is deceit, for passing-off is one of the ways whereby the goods of one trader are sold by another in a manner calculated to deceive the purchaser into thinking that they are the goods of the former.

In India there is no system of registration of trade-marks, nor is there any provision for a statutory title to a trade-mark. The rights of parties will therefore be determined according to common law.

A trade name may be either the name of the manufacturer of goods or some name by which the manufactured goods have become generally known. The wrong consists in any other person selling goods of his own in such a way as to lead the public to suppose that they are purchasing someone else's goods. The principle is that nobody has any right to represent his goods as the goods of somebody else (*Reddaway* v. *Benham*). But where a trade name is merely descriptive of the article, whether originally a descriptive name or not, and does not designate manufacture by any particular firm, it cannot any longer be exclusively retained by the original maker, but may be adopted by any other trader.

A man is entitled to carry on his business in his own name so long as he does not do anything more than that to cause confusion with the business of another, and so long as he does it honestly. The Court will not restrain a man from trading in his own name except where he uses his name in such a way as to pass off his goods as the goods of another.

Torts to person and property.

Chapter XX.

Negligence is the breach of a duty caused by the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. An action for negligence proceeds upon the idea of an obligation or duty on the part of the defendant to use care, and a breach of it to the plaintiff's injury. Negligence, therefore, amounts to the absence of the care which a prudent and reasonable man would take in the circumstances. The law takes no cognisance of carelessness in the abstract. It concerns itself with carelessness only where there is a duty to take care and where failure in that duty has caused damage. It is not necessary that the duty neglected should have arisen out of a contract between the plaintiff and the defendant. However the duty may arise, whether by a statute or otherwise, if it exists and is neglected to the injury of the plaintiff, he has a right to sue for damages. There cannot be liability for negligence unless there is a breach of some duty. Negligence in law is, therefore, (1) a breach of a duty, (2) *unintentional*, (3) producing injury to another, (4) possessing equal rights.

Standard or degree of care.—The standard by which to determine whether a person has been guilty of negligence is the conduct of a prudent man in the particular situation. The amount of care may vary to the greatest extent, while the standard itself remains the same. The prudent man is the man who has acquired the skill to do the act which he undertakes. If a man has not acquired the skill to do a particular act he undertakes, *then he is imprudent, however careful he may be and however* great his skill in other things. The question to be raised with regard man's conduct brought in question is, whether a prudent or diligent man of his calling or business or skill would have und...

the thing in question, supposing the party to have exercised due care in executing the work undertaken.

The degree of care which a man is required to use in a particular situation varies with the obviousness of the risk. If the danger of doing injury to the person or property of another by the pursuance of a certain line of conduct is great, great care is necessary. If the danger is slight, only a slight amount of care is required. Thus owners or occupiers of real property must not act in such a way as to cause injury to the person or property of others. The care that will be required of them will be the care that an ordinary prudent man is bound to exercise. But persons who profess to have special skill or who have voluntarily undertaken a higher degree of duty are bound to exercise more care than an ordinary prudent man.

Good sense and policy of the law impose some limit upon the amount of care, skill, and nerve, which are required of a person who has to encounter a sudden emergency. In a moment of peril and difficulty the Court should not expect perfect presence of mind, accurate judgment, and promptitude. If a man is suddenly put in an extremely difficult position and a wrong order is given by him, it ought not to be attributed to him as a thing done with such want of nerve and skill as to amount to negligence. If in a sudden emergency a man does something which he might, as he knew the circumstances, reasonably think proper, he is not to be held guilty of negligence, because, upon review of the facts, it can be seen that the course he had adopted was not in fact the best.

Owners and occupiers of real property.

The strict principle of law is—*sic utere tuo ut alienum non lædas* (every one must so use his own as not to do damage to another). When this maxim is applied to landed property, it is necessary for the plaintiff to show not only that he has sustained damage, but that the defendant has caused it by *going beyond* what is necessary in order to enable him to have the *natural* use of his own land. The owner or occupier of land may lawfully use it for any purpose for which it might in the ordinary course of the enjoyment of land be used. And for the *natural user* of land an owner will not, in the absence of negligence, be liable though damage results to his neighbour (*Chasemore* v. *Richards*, the percolation case). But for any *non-natural* user, such as the introduction on the land of something which in the natural condition of the land is not upon it, he is liable if damage results to his neighbour. *Rylands* v. *Fletcher* (the reservoir case) fully establishes the principle that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, he is *prima facie* answerable for all the damage which is the natural consequence of its escape. This is the established law whether the things so brought be beasts or water, or filth, or stenches, or electricity, or a traction engine, or a motor car with petrol in it. It is immaterial whether he is or is not aware of the danger at the time when he brings and uses them.

There are, however, several exceptions to the principle laid down in *Rylands* v. *Fletcher*.

(1) *Vis major* or act of God, is such a direct, violent, sudden, and irresistible act of nature as could not by any amount of human foresight have been foreseen or, if foreseen, could not by any amount of human care and skill have been resisted (*Nichols* v. *Marsland*, the unusual rain case; *Blyth* v. *Birmingham Waterworks Co.*, the severe frost case). Thus those acts which are occasioned by the elementary forces of nature, unconnected with the agency of man or other cause, will come under the category of acts of God. e.g storm, tempest, lightning, extraordinary fall of rain, extraordinary high tide, extraordinary severe frost.

(2) Wrongful act of a third party (*Box* v. *Jubb*, the third party water case).

(3) Plaintiff's own fault.

(4) Artificial work, maintained for the common benefit of the plaintiff and the defendant (*Carstairs* v. *Taylor*, the rat case).

(5) When it is the consequence of an act done for public purposes in the discharge of a public duty under the express authority of a statute (*Madras Railway Co.* v. *Zemindar of Carvetinagram*, the reservoir case).

The duty in regard to the case of owners or occupiers of houses, land, or structures, differs according as the persons in regard to whom it has to be exercised. These persons fall into the following categories:

(1) trespassers; (2) licensees; (3) invitees; and (4) persons lawfully passing by.

(1) Trespasser.—A trespasser is a person who enters into another's property without any right or permission. The general rule is that there is no duty of care towards such person. He who enters wrongfully does so at his own risk in all respects. The occupier has no duty to take reasonable care for his protection or even to protect him from concealed danger. He is liable only where the injury is due to some wilful act involving something more than the absence of reasonable care. There must be some act done with the deliberate intention of doing harm to the trespasser, or at least some act done with reckless disregard of the presence of the trespasser. Thus he must avoid endangering the safety of trespassers by concealed dangers in the nature of a trap, or such as would be likely to punish intruders in a cruel manner (*Bird* v. *Holbrook* and *Illott* v. *Wilkes*, the spring-gun cases).

(2) Licensee.—A licensee is a person who enters on premises under a license from the occupier, either express or implied. A bare licensee is only entitled to use the place as he finds it. Any complaint by him may be said to wear the colour of ingratitude so long as there is no design to injure him. The licensee or guest must take care of himself and no action will lie unless the accident by which he sustained the injury has been caused by the negligence of the owner (*Southcote* v. *Stanley*, the glass pane case). The duty of the occupier is—

(1) To caution him against any known insecurity or hid danger which is of a not readily discoverable character, and of whi occupier was aware but the other party was ignorant. If the

obvious, the licensee must look out for himself. If it is one to be expected, he must expect it and take his own precautions.

(2) Not to alter the character of the place by placing on it dangerous obstructions (*Corby* v. *Hill*, the slate case). The owner is under no liability as to existing traps, but must not create new ones without taking precautions to protect the licensee against them.

The position of a licensee is better than that of a trespasser in that he is entitled not to have the condition of the premises so altered as to set up a trap for him. A guest, or a person who enters into premises to solicit orders, or to beg, or to hold any communication with the occupier, is a licensee.

(3) Invitee.—An invitee is a person who is on the premises for some purpose in which he and the occupier have a common interest. This class includes invitees—

(*a*) who do not pay for their presence on the premises, and
(*b*) who use the premises on payment.

The duty with reference to class (*a*) is this. The person invited, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger which he knows or ought to know. If the danger is not such that he ought to know of it, his liability does not extend to it (*Indermaur* v. *Dames*, the shaft case; *Heaven* v. *Pender*, the staging case; *Smith* v. *London & St. Katherine's Dock Co.*, the gangway case).

The duty is greater in respect of class (*b*). Where the occupier of premises agrees for reward that a person shall have a right to enter and use them for mutually contemplated purpose, the contract between the parties contains an implied warranty that the premises are as safe for that purpose as reasonable care and skill on the part of any one can make them. The rule is subject to the limitation that the defendant is not to be held responsible for defects which could not have been discovered by reasonable care or skill on the part of any person concerned with the construction, alteration, repair or maintenance of the premises. The principle is basic and applies alike to premises and to vehicles.

There is a distinction between an invitee and a licensee. The invitor and invitee have a common interest, but the licensor and licensee have none. The owner of premises incurs liability to the former as to the existing traps but not to the latter.

(4) Passer-by.—In regard to persons lawfully passing by the premises, the duty of the owner of the premises extends to guarding against what may happen just beyond the premises, on the road, or other place, where they may lawfully be. It is incumbent upon the owner to show that he used that reasonable care and diligence which he was bound to use (*Tarry* v. *Ashton*, the lamp case; *Kearney* v. *London, Brighton & South Coast Ry.*, the brick case; *Byrne* v. *Boadle*, the barrel case).

Children.—If children are trespassers the only duty of the landowner is not to injure them intentionally, or to put dangerous traps for them intending to injure them. He is under no liability if, in trespassing, they injured themselves on objects legitimately on his land. To make a land-

owner liable for injury to children on his land, it must be proved that he expressly or impliedly invited them on to his land, and either did an act which caused damage with knowledge that it might injure them, or knowingly permitted the existence on his land of a hidden danger or trap.

Level crossing.—Railway companies are bound by statutes to shut the gates of a level crossing while a train is approaching. If they omit to do so, *they invite persons to cross the line, and thereby put them off their* guard, and are liable for the injuries which ensue. The plaintiff must allege and prove, not merely that the company was negligent, but that its *negligence caused or materially contributed to the injury.*

An invitation to alight on the stopping of a train without any warning of danger to a passenger, who is so circumstanced as not to be able to alight without danger, such danger not being visible or apparent, amounts to negligence on the part of a railway company. Again, if a person, thinking, on the train stopping, that it has arrived at his station, and that he should, therefore, alight, does so, and, by reason of its having overshot the platform, he is injured, the company is liable.

Persons professing to have greater skill.

Where persons hold themselves out to be persons of skill, they are bound to conduct themselves in a skilful manner. To all such persons the maxim *spondes peritiamartis* (if your position implies skill, you must use it) applies.

Of this class are :—

(I) Directors of companies.
(II) Carriers.
(III) Innkeepers.
(IV) Doctors.
(V) Solicitors.
(VI) Bankers.
(VII) Manufacturers.

(I) Directors are persons holding themselves out as capable of directing complicated affairs and inviting persons to trust their money to the company which they direct. They are, therefore, bound to show more than ordinary care towards the shareholders. They must show diligence which good men of business are accustomed to show.

(II) Carriers are of two kinds :

1. Carriers of goods. 2. Carriers of passengers.

Any one who undertakes to carry the goods of all persons indifferently, for hire, is a common carrier. A carrier of passengers is not a common carrier.

1. Common carriers of goods are of two descriptions :—

(*a*) Carriers by land, e.g. proprietors of stage-coaches and omnibuses and also truckmen, waggoners, team masters, cartmen, etc.

(*b*) Carriers by water, e.g. coasting ships, steam boats, etc.

(*a*) A carrier by land is bound to carry all goods offered for transportation by any person. He must take utmost care of those goods *from the moment of receiving them.*

(*b*) A carrier by water is bound to provide a ship tight, staunch and strong, and to guard against all injuries incident to the property.

Common carriers are liable for loss or injury to goods even t

there may have been no negligence, except where the loss or injury is caused by an act of God, or the King's enemies, or an inherent vice or defect in the goods carried. The carrier may limit his liability by means of a special contract or of conditions.

2. Carriers of passengers are of two descriptions :—

(*a*) Passenger carriers on land.

(*b*) Passenger carriers by water.

(*a*) Passenger carriers on land are bound—

(1) To carry passengers whenever they offer themselves and are ready to pay for their transportation, if they have room or accommodation.

(2) To provide road-worthy vehicles.

They are not liable for any accident which happens not owing to any defect in the construction of the vehicle.

In regard to their liability for the baggage of passengers, articles of necessity, and personal convenience, they stand upon the ordinary footing of common carriers.

Railway companies are bound to use proper care and skill in carrying their passengers but they are not liable independently of negligence.

(*b*) Passenger carriers by water are under the same obligations with respect to the safety of passengers as carriers by land.

(III) An innkeeper is a keeper of a common inn for the lodging and entertainment of travellers and passengers, their horses and attendants, for a reasonable compensation. A person who keeps a private boarding or lodging house is not an innkeeper.

An innkeeper is bound to provide lodging and entertainment for all at a reasonable price if he has accommodation : not so a boarding-house keeper. He must guard their goods with proper diligence. He is not an insurer of the goods, but is liable for negligence (*Calye's* case, the horse theft case). He is not liable, for instance, if the guest's friend or servant steals or carries away the goods.

The liability of an innkeeper with respect to the personal safety of his guest is less onerous. He does not insure the personal safety of the guest. The guest is an invitee, and the innkeeper as the occupier of premises to which he has invited the guest, is bound to take reasonable care to prevent damage to the guest from unusual danger which the occupier knows or ought to know of. But further by reason of the contractual relationship existing between an innkeeper and a guest there is an implied warranty by the innkeeper that the premises are as safe as reasonable care and skill on the part of any one can make them. The innkeeper is not responsible for defects which could not have been discovered by reasonable care or skill on the part of any person concerned with the construction, alteration, repair, or maintenance of the premises.

(IV) Physicians.—Every person who enters into a learned profession undertakes to bring to the exercise of it such care and skill as become one belonging to that profession. A physician or a surgeon does not undertake that he will perform a cure, but he undertakes to bring a fair, reasonable, and competent degree of skill.

(V) Solicitors, like physicians, undertake matters of the very highest difficulty and importance. Ordinary neglect, where so great a care is demanded, becomes very grave. Where a solicitor is guilty of negligence the Court may order him to make good any loss occasioned by such negligence.

(VI) Bankers hold themselves out as persons worthy of trust and as persons of skill. They are liable for negligence in paying forged cheques. The Privy Council has laid down that negligence on the part of the customer in drawing a cheque (e.g., a cheque drawn with spaces so that a forger can utilize them) disentitles him from recovering the extra amount paid by the banker (*Colonial Bank of Australia's* case). The House of Lords have held that a customer of a bank owes a duty to the bank in drawing a cheque to take reasonable precautions against forgery, and if as the natural result of the neglect of those precautions the amount of the cheque is increased by forgery, the customer must bear the loss (*London Joint Stock Bank's* case).

(VII) Manufacturers.—A manufacturer of an article of food, medicine or the like, sold by him to a distributor in circumstances which prevent the distributor or the ultimate purchaser or consumer from discovering by inspection any defect, is under a legal duty to the ultimate purchaser or consumer to take reasonable care that the article is free from defect likely to cause injury to health (*Donoghue* v. *Stevenson*, the snail case; *Grant* v. *Australian Knitting Co.*, the woollen garment case). The duty of one who produces and sells food or drink or medicine, intended for human consumption, and prepared for use in such a way that the user cannot test its condition beforehand by any ordinary examination is that he must use reasonable diligence to ensure freedom from possible non-apparent defects which would be likely to make the product noxious or dangerous in use; and if he does not, any consumer who sustains damage from such a defect shall have his action. In order to render a manufacturer liable to the ultimate purchaser, it is necessary that the article must reach the purchaser in the form in which it leaves the manufacturer without opportunity for intermediate examination. A manufacturer will not be liable where the retail dealer had an opportunity of inspection and could by a simple test have ascertained the unsuitability of the goods for the purpose for which they were sold (*Kubach* v. *Hollands*, the school chemicals case).

Persons voluntarily undertaking higher degree of duty.

Persons possessing or using dangerous things are bound to exercise more than ordinary care in respect of them while in their control, and to keep them safe at their peril. Of this class are persons keeping—

(I) Dangerous animals.	(III) Gas.
(II) Dangerous goods.	(IV) Machinery.

(I) Dangerous animals are of two classes—

(i) those that are of a dangerous character (animals *f* *naturæ*) which a person must keep at his peril, e.g. a lion, a bear, an ape, an elephant; and

(*ii*) those not of a dangerous nature (animals *mansuetæ naturæ*), e.g. dogs, horses, rams or bulls.

A person who keeps a savage animal of the first class is bound to keep it so far under control as to prevent it indulging its propensities and inflicting injuries. If the animal escapes and hurts any one, the owner is liable to an action for the damage, without any averment of negligence or default in the securing or taking care of it. The gist of the action is the keeping of the animal after the knowledge of its mischievous propensities (*May* v. *Burdett*, the monkey case).

In regard to animals of the second class, the owner is liable for their trespasses and consequent damage, but not for other injuries unless proof of *scienter* is given as to the propensity of the animal itself to do the act in question (*Cox* v. *Burbridge*, the kick case). As regards trespasses there is a distinction between animals which from their natural tendency to stray require to be restrained and those which are not usually kept confined. Owners of dogs and cats are not responsible for their trespasses. As regards other injuries knowledge of the defendant that the animal was prone to injure mankind must be established (*Osborne* v. *Chocqueel*, the dog-bite case), and, for this, a single instance of the ferocity of such animal is sufficient notice. Such knowledge may be either personally possessed by the defendant or may have been brought to his notice impliedly by the knowledge of some one whose business connected him with the animal. When the cause of action is an injury which has been inflicted by a dog on cattle and sheep no evidence of *scienter* need be established, and damages are recoverable by the owner of such animal.

(II) Dangerous goods.—Under dangerous goods come fire, fire-arms, fireworks, explosive materials, and poisonous drugs.

(*i*) Fire.—Every person who lights a fire for 'non-domestic' purposes is clothed with a heavy responsibility to his neighbours as regards the lighting, safe-keeping, and spreading of such fire. He must keep the fire in his land at his peril. Thus, where the Legislature has sanctioned the use of locomotives, there is no liability for injury caused by sparks flowing from them. But if there is no such sanction given, a railway company is liable for injury caused by such sparks even though there is no negligence. If the railway company had not express statutory power to use such engines, it is liable for damage by fire proceeding from it, though negligence be negatived, because it does so at its peril.

A man is not liable for damage caused by 'domestic' fire, that is, a fire which began in his house or on his land, provided it originated by accident and without negligence. But if a fire is negligently lighted or kept by a person or his servant, he will be liable for any injury thereby occasioned to his neighbour.

(*ii*) Fire-arms.—Loaded fire-arms are highly dangerous things, and more than ordinary care is necessary in dealing with or handling them (*Dixon* v. *Bell*, the gun case).

(*iii*) Explosives.—Persons are bound to use the very greatest care in the use of fireworks and other highly explosive materials or materials otherwise dangerous or destructive. The law, having regard for human

life and safety, demands great care from owners and controllers of dangerous goods.

(*ii*) Poisonous drugs.—Similarly persons dealing with poisonous drugs are bound to exercise more than ordinary care as the mischief which is likely to occur for want of such care is extremely dangerous to the public (*Thomas* v. *Winchester*, the belladonna case).

(III) Gas.—Gas companies are bound to exercise the very greatest care, for they are using a material of a dangerous character.

(IV) Machinery.—Persons using dangerous machinery are required by several Acts to take proper precautions.

Contributory negligence is negligence in not avoiding the consequences arising from the negligence of some other person, when means and opportunity are afforded to do so. It is the non-exercise by the plaintiff of such ordinary care, diligence, and skill as would have avoided the consequences of the defendant's negligence. The law takes into consideration any act or conduct of the party injured or wronged which may have immediately contributed to that result. Where such conduct can be proved, the party is considered in law to be the author of his own wrong, and it is fatal to any action on his part based on the injury. This doctrine seems to be founded upon the maxims *volenti non fit injuria* and *in jure non remota causa sed proxima spectatur.* Its principles may be summarized as follows :—

(1) Wherever the *immediate, proximate* or *decisive* cause of the damage is the plaintiff's own negligence or want of care and caution, so that, but for such negligence or want of ordinary care and caution, on his part, the misfortune would not have happened, he is not entitled to recover (*Davies* v. *Mann*, the donkey case ; *Butterfield* v. *Forrester*, the pole case ; *Tuff* v. *Warman*, the barge case).

(2) The plaintiff, however, is not disentitled to recover unless it is shown—

(*i*) that he might by the exercise of ordinary care have avoided the consequences of the defendant's negligence ; or

(*ii*) that the defendant could not have avoided the consequences of the plaintiff's negligence by the exercise of ordinary care (*Radley* v. *London & North Western Ry.*, the truck case).

The question will be, which of the parties had it last in his power to avert the disaster ?

(3) Where the *direct* and *immediate* cause of the accident is the defendant's fault, so that without it the accident could not have happened at all, it is no answer that, only for the plaintiff's negligence in something *collateral* to the immediate cause of the injury, it or part of it might have been avoided.

(4) If there has been as much want of reasonable care on the plaintiff's part as on the defendant's, the plaintiff cannot sue the defendant.

The doctrine of contributory negligence is unknown to the maritime law administered in the Court of Admiralty jurisdiction ; and is also not inflexibly applied in cases where young children are concerned (*Lynch* v. *Nurdin*, the horse-cart case).

Upon the issue of contributory negligence the burden of proof is on the defendant.

Children.—The rule as to contributory negligence is not inflexibly applied in cases where young children are concerned. Allowance is made for their inexperience and infirmity of judgment. An infant can recover, although its conduct contributed to the injury, if the defendant is shown to have failed in his duty to the infant (*Lynch* v. *Nurdin*). If there is no allurement, trap, or dangerous object requiring care, the defendant is not liable. If a child is guilty of what in a grown up person would be mere negligence and nothing more, the child is not disentitled to relief.

The Madras High Court has held that children capable of discrimination and perceiving danger can be guilty of contributory negligence.

Choice of evils.—Where the creation of a dangerous situation is ascribable to the negligent act of the defendant, he is not to be excused from liability for consequent harm by reason of the fact that the person endangered loses self-possession and in the confusion incident to the danger takes a course which turns out not to be the safest one. In such circumstances contributory negligence on the part of the person injured is not made out unless he is shown to have acted with less caution than any person of ordinary prudence would have shown under the same trying conditions.

Doctrine of Identification.—This doctrine was that where a person voluntarily engaged another person to carry him, he so identified himself with the carrier as to be precluded from suing a third party for negligence in cases where the carrier was guilty of contributory negligence (*Thorogood* v. *Bryan*, the omnibus case). But this doctrine is expressly overruled in the case of *The Bernina* (the collision case) which lays down that where damage is sustained by the concurrent negligence of two or more persons there is a right of action against all or any of them at the plaintiff's option, and the exception of contributory negligence extends only to the acts and defaults of the plaintiff himself, or of those who are really his agents. Where a child is in the custody of an adult, the contributory negligence of the adult will not disentitle the child from recovering damages, because *the child is not so identified with the adult that his negligence would amount to the negligence of the child.* (*Oliver's* case, the grandfather's negligence case).

Breach of statutory duties.—If things authorized to be done by a statute are carelessly done an action lies. Such breach is known as "statutory negligence."

There are three classes of cases in which a liability may be established founded upon a statute :—

(1) Where there is a liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law ; there, unless the statute contains words which expressly or by necessary implication exclude the common law remedy, the party suing has his election to pursue either that or the statutory remedy.

(2) Where the statute gives the right to sue merely, but provides

no particular form of remedy, there the party can only proceed by action at common law.

(3) Where a liability not existing at common law is created by a statute, which at the same time gives a special and particular remedy for enforcing it, the remedy provided by the statute must be followed.

The right of the private individual to recover is subject to the following two conditions :—

(1) The injury must be of a kind which is within the scope of the Act creating such duty and not merely an accidental result of its breach.

(2) Where an Act creates an obligation and enforces the performance in a specified manner, performance in any other manner cannot be enforced.

Burden of proof.—As a rule, the onus of proving negligence is on the plaintiff. He must not merely establish the facts of the defendant's negligence and of his own damage, but must show that the one was the effect of the other.

First, where there is *no contract* the plaintiff must prove facts inconsistent with due diligence on the defendant's part. Where the balance is even as to which party is in fault, the one who relies on the negligence of the other is bound to turn the scale.

Secondly, where there is a contract or personal undertaking, the plaintiff must prove such contract or undertaking and also injury to himself. The mere fact of an injury happening, if unexplained, is evidence of negligence. It is for the defendant to prove that he himself was exercising due care.

Thirdly, under certain circumstances, the mere happening of an accident will afford *prima facie* evidence that it was the result of want of due care; *res ipsa loquitur* (the thing speaks for itself). This is so when—

(*i*) the injurious agency was under the management or control of the defendant, and

(*ii*) the accident is such, as, in the ordinary course of things, does not happen if those who have the management use proper care (*Byrne* v. *Boadle*, the barrel case; *Scott* v. *London Dock Co.*, the sugar bag case). The defendant may rebut this presumption if he can.

Chapter XXI.

Nuisance is anything done to the hurt or annoyance of lands, tenements, or hereditaments of another, and not amounting to a trespass. Nuisances are of two kinds :

(1) Public; and (2) Private.

(1) **Public nuisance** is an act or omission, which causes any common injury, danger, or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger, or annoyance to persons who may have occasion to use any public right (s. 268 of the Indian Penal Code). Public nuisance, which is an offence against the public order and economical regimen of the State, affects all equally, and can only be the subject of one indictment, otherwise, a party might be ruined by a million suits. N length of time can legalize it, as it cannot have a lawful beginning.

order that an individual may have a private right of action in respect of a public nuisance—

(*i*) he must show a particular injury to himself beyond that which is suffered by the rest of the public;

(*ii*) such injury must be direct and not a mere consequential injury; and

(*iii*) the injury must be shown to be of a substantial character, not fleeting or evanescent. The damage caused to the plaintiff must thus be particular, direct and substantial (*Benjamin* v. *Storr*, the waggon case; *Soltau* v. *De Held*, the bell case).

(2) Private nuisance is the using or authorizing the use of one's property, or of anything under one's control, so as to injuriously affect an owner or occupier of property by physically injuring his property or by interfering materially with his health, comfort or convenience. Private nuisance is an act affecting some particular individual or individuals as distinguished from the public at large. It cannot be made the subject of an indictment, but may be the ground for civil action for damages or an injunction or both. A right to commit a private nuisance may be acquired by prescription as an easement. The degree of harm in an action brought for a nuisance on the ground that the thing alleged to be a nuisance is productive of *personal discomfort* must be greater than in an action brought on the ground that it produces *injury to property*.

In the case of physical discomfort, the act complained of must, having special regard to the circumstances and surroundings of the defendant's property, be—

(*i*) in excess of the natural and ordinary course of enjoyment of the property; and

(*ii*) materially interfering with the ordinary comfort of human existence (*Walter* v. *Selfe*, the brick case).

Private nuisances for the most part arise in respect of

(1) Obstruction to light.
(2) Pollution of air or water.
(3) Noise.

In the case of *injury to property* any sensible injury would be sufficient to support an action (*St. Helen's Smelting Co.* v. *Tipping*, the vapour case). Nuisances of this class arise from manufacturing works, sewers, drains, etc. A person is not debarred from suing for a nuisance because it existed before he came to its neighbourhood.

Who may sue.—For nuisances of *temporary* character the actual occupier of premises alone can sue. If the injured property is in the occupation of tenants, the landlord or reversioner has no right of action, unless the nuisance is of a *permanent* character and necessarily inflicts a *lasting* damage to the inheritance. So long as the tenants stay and endure the nuisance they are the only persons who can complain. A person who has no interest in the property or no right of occupation cannot maintain an action.

Who is liable.—He who actually creates a nuisance is liable for it. Where a nuisance is caused by the physical condition of premises resulting from an act of *commission*, the party who *originally* created the nuisance remains liable. Where the physical condition of the premises complained

of is the result of a wrong of *omission*, the owner cannot free himself from liability for the possible consequences of his breach of duty by merely letting the premises to tenants without taking a covenant from them to repair the premises. If he let them without such a covenant, both landlord and tenant are liable.

Liability of a landlord.—The owner of dilapidated premises may demise them as they are. A landlord who lets a house in a 'dangerous' state is not liable to the tenant's customers or guests for accidents happening during the term. The only duty which the landlord owes to them is not to expose them to a concealed danger or trap.

If there is a defect in the premises likely to cause injury, but known both to the landlord and the tenant, the landlord is not responsible for injuries caused to the tenant.

Remedies.—The remedies for nuisance are—

(1) Abatement.
(2) Damages.
(3) Injunction.

(1) Abatement means the removal of a nuisance by the party injured. The removal must be peaceable, without danger to life or limb, and, if it is necessary, to enter another's land or property after notice to remove the same. Nuisance by an act of commission may be abated without notice to the person who committed it, but not nuisance from omission (except that of cutting the branches of a tree overhanging a person's property). But, if a speedy remedy is required and it is unsafe to wait, nuisance by omission could be abated without notice.

The abatement of a nuisance by a private individual is a remedy which the law does not favour. Under the Indian Easements Act, the dominant owner cannot himself abate a wrongful obstruction of an easement.

A private individual cannot abate a public nuisance, unless it causes him some special and peculiar harm.

(2) The measure of damages is the diminution in the saleable value of property in consequence of nuisance.

(3) In order to obtain an injunction it must be shown that the injury complained of as present or impending is such as by reason of its gravity or its permanent character, or both, cannot be adequately compensated in damages. The injury must be either irreparable or continuous.

Chapter XXII.

Fraud.—The making of a representation which a party knows to be untrue, and which is intended, or is calculated to induce another to act on the faith of it, so that he may incur damage, is fraud in law. *It is not necessary that the defendant should* be benefited by the deceit, or that he should collude with the person who is benefited, or that the false representation should have been made from a corrupt motive of gain to the defendant or a wicked motive of injury to the plaintiff. In order to sustain an action of deceit—

First, there must be fraud, and nothing short of that will suffice.

Secondly, fraud is proved when it is shown that a false representation has been made

(*i*) knowingly, or
(*ii*) without belief in its truth, or

(*iii*) recklessly, careless whether it be true or false.

Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made (*Derry* v. *Peek*, the prospectus case).

The rule in *Derry* v. *Peek* does not apply to—

(1) Directors issuing a prospectus (*vide* the Companies Act, s. 37; the Indian Companies Act, s. 100).

(2) Where an estoppel is created.

(3) Where the law of warranty is applicable.

(4) Where there is contractual duty to take care in making the statement.

(5) Where there is a fiduciary relationship between parties.

(6) Where there is a statutory duty to give correct information.

(7) Where a statement is made in relation to property of a dangerous character.

A representation, in order to be fraudulent, must be—

(1) A representation which is untrue in fact. There must be an active attempt to deceive by a statement which is false in fact and fraudulent in intent. The representation need not be by words, it may be by acts (*Pickering* v. *Dawson*, the wall case). Again, it must be a representation of fact, and must not be a mere expression of opinion. A suppression of the truth may in some cases amount to a suggestion of falsehood. Mere silence with regard to a material fact will not give a right of action unless

(*a*) active artificial means have been taken to prevent the other party from discovering the fact for himself; or

(*b*) the essence of the transaction implied confidence reposed in the party concealing to divulge all material facts.

Non-disclosure when there is no duty to disclose is not fraud. But there are circumstances when a duty is cast on a person to disclose material facts. This duty may arise in several ways:

(*i*) a duty which a man owes to the world at large, such as not to leave a loaded gun in a public place;

(*ii*) a duty arising out of fiduciary relationship between the parties; or

(*iii*) a duty arising out of the nature of the contract as when it is *uberrimæ fidei*.

(2) A representation which the defendant knows to be untrue or is indifferent, or careless, as to its truth. Unless this is so, a representation which is false gives no right of action to the party injured by it (*Dickson* v. *Reuter's Telegraph Co.*, the barley case). No action lies upon a representation which the maker honestly believed to be true, however unreasonable the grounds of his belief (*Derry* v. *Peek*, the prospectus case; *Chandelor* v. *Lopus*, the bezour stone case). On the other hand, honesty of motive does not atone for knowledge of falsity (*Polhill* v. *Walter*, the bill case). But a negligent misrepresentation does not amount to deceit (*Low* v. *Bouviere*, the incumbrance case).

(3) A representation which was intended or calculated to induce

the plaintiff or a third person to act upon it. Intention to induce a course of conduct is always necessary. Whether the representation is made to the plaintiff, or to a third party, is immaterial, if it is false to the knowledge of the defendant, and has been made for the purpose of being communicated to the plaintiff (*Langridge* v. *Levy*, the gun case; *Longmeid* v. *Holliday*, the lamp case) or to a class of persons of whom the plaintiff is one (*Denton* v. *Great Northern Ry.*, the time-table case). The misrepresentation should have been made in relation to the transaction in question (*Peek* v. *Gurney*, the prospectus case).

(4) A representation which the plaintiff or the third person acts upon and suffers damage. The plaintiff must show that he was deceived by the fraudulent statement and acted upon it to his prejudice. Fraud without damage, or damage without fraud, gives no cause of action; but where these two concur an action lies (*Paseley* v. *Freeman*, the cochineal case; *Horsfall* v. *Thomas*, the cannon case).

The injury must be the immediate, and not the remote, consequence of the representation made. The defendant will be held responsible for so much of the damage or loss as was the necessary, natural, or probable consequence of the misrepresentation.

For the liability of a principal for the misrepresentation made by his agent, see the tabular analysis on page 388.

Tort founded on contract. Chapter XXIII.—Where there is a privity of contract between two parties, there are two classes of cases in which the remedy for a breach of duty arising out of the contract is an action in tort, viz., where the damage is caused by negligence or fraud. The class of injuries, which lie on the border-land between contract and tort, is divided into three divisions—

1. Alternative forms of remedy on the same cause of action.

Where the same state of facts shows not only a breach of contract, but also a breach of a common law duty, a party to the contract may sue at his election on the contract or in tort. Thus, for negligence or unskilfulness, a carrier, a solicitor, or a surgeon, may be liable in tort or in contract. But a stranger to the contract can only sue in tort.

2. Concurrent causes of action. Herein fall—

(1) Cases where it is doubtful whether a contract has been formed, and the same act is a breach of contract, if any, is at all events a tort (*Denton* v. *Great Northern Ry.*, the time-table case; *Austin* v. *Great Western Ry.*, the ticketless infant case).

(2) Cases where A can sue B for a tort though the same facts may give him a cause of action against M for a breach of contract (*Foulkes* v. *Metropolitan District Ry.*, the travelling on different railways case).

(3) Cases where A can sue B for a tort though B's misfeasance may be a breach of a contract made with M (*Langridge* v. *Levy*, the gun case; *George* v. *Skivington*, the hair-wash case; *Donoghue* v. *Stevenson*, the snail case).

3. Causes of action in tort dependent on a contract not between the same parties, e.g. procuring a breach of contract (*Lumley* v. *Gye*; *Bowen* v *Hall*).

APPENDIX I.

QUESTIONS.

CHAPTER I.

1. WHAT is a tort? Is privity necessary to support an action in tort?

2. Give the best definition that you can of a tort. State what, if any, is the common basis of all torts, and suggest any scheme for classifying particular torts according to the elements they have in common.

3. State the necessary constituents of a tort.

4. In what respects does a tort differ from a contract and from a crime?

5. Give an instance of a transaction which is at the same time a tort, a crime, and a breach of contract.

6. Classify the grounds on which a person may be held liable for tort.

7. Explain the distinction between injury and damage. Which of these is essential to an action for tort? Discuss the question and give examples.

8. What do you understand by *damnum* and *injuria*? Give instances of *damnum sine injuria, injuria sine damno, damnum et injuria*, and state which of them does or does not give a right of action.

9. Explain the proposition "an injury imports a damage."

10. "There must be injury as well as damage. Damage alone will not do". What does this mean?

11. Explain and illustrate *ubi jus ibi remedium.*

CHAPTER II.

12. State the distinction between damage and damages.

13. Mention the classes of cases in which there is no actionable wrong unless a special damage is proved; and those in which an action for tort lies, although no actual damage is alleged.

14. How does Lord Campbell define 'malice'? Distinguish between 'malice in fact' and 'malice in law'. Cite cases in support of your answer.

15. Give instances of cases of tort in which before a plaintiff can succeed he must prove 'malice in fact' against the defendant.

16. How far can motive and intention of a wrong-doer be made elements of judicial consideration?

CHAPTER III.

17. What persons cannot sue, and what cannot be sued, in tort owing to personal disability?

18. How far is a minor liable for a tort? Discuss to what extent tenderness of age of infants is immaterial to their liability for torts.

19. Is infancy a valid defence in any and what actions founded on tort, and on what principle?

20. Can a corporation either sue or be sued, and, if so, under what circumstances, for (*a*) defamation, (*b*) deceit, (*c*) malicious prosecution.

21. How far are corporations liable for torts committed by them? State their liability in cases of non-feasance and misfeasance.

CHAPTER IV.

22. What is the object of the English rule of law that in a case of felony the civil remedy is suspended until the prosecution of the offender criminally? Does this rule of law prevail in India? Does it still prevail in England? Can you mention any recent cases on the subject?

CHAPTER V.

23. Under what circumstances is a wrong-doer liable for torts committed in a foreign territory? Explain fully the law on the subject, and refer to any decided cases you know bearing on the question.

CHAPTER VI.

24. State the general exceptions to the general liability for civil wrongs, and examine and define any two of these grounds of exception.

25. In what cases no liability is imposed on the wrong-doer for a *prima facie* wrongful act?

26. Under what circumstances will the plea of act of State be a good answer to a suit for damages for an act *prima facie* tortious? Mention any leading cases on the subject (1) in England, (2) in India.

27. What Indian cases decide that "between the Sovereign and his own subjects there can be no such thing as an act of State"?

28. What is the extent of the liability of the Secretary of State for India in Council to be sued for the acts or omissions of a Government officer in British India?

29. What is the extent of protection afforded by the Indian law to judicial officers and those who act under their orders against liability for acts done by them in the course of their official duties? Point out the distinction, if any, between the Indian and the English law on the subject.

30. What are the liabilities of a judicial officer for false attachment?

31. How far is a man liable for accidental harm done to another?

32. Explain the meaning of the maxim *actus dei nemini facit injuriam.*

33. Explain fully the maxim *volenti non fit injuria.*

34. Can a wrong-doer sue for wrong done to himself, and, if so, in what cases?

CHAPTER VII.

35. In how many ways can a vested right to an action for tort be discharged? Give examples of each way.

36. Explain the meaning and application of the maxim *actio personalis moritur cum persona* with reference to torts. What exceptions to it are recognized by statutes in England and in India?

37. Can a suit for damages against a wrong-doer be continued after his death against his executor?

38. Under what circumstances does the liability for a wrong devolve upon the representatives of a wrong-doer, and the right of action in respect of the wrong survive in favour of the representatives of the injured person?

39. In a suit for defamation, the plaintiff obtained a decree for damages against the defendant and executed it. The defendant appealed but died before it could be heard. Can his son continue the appeal?

40. In what cases may an action be brought in England against the representatives of a deceased tort-feasor? In what cases may the executor of a deceased person sue for torts done to the deceased in India?

41. What are the principal provisions of Lord Campbell's Act? What is the law in India?

42. What damages can the relatives of a person who has been killed in a railway accident recover against the railway company? What must they prove to succeed in the action, and how will the damages be assessed?

CHAPTER VIII.

43. In what classes of cases, and on what grounds, may one person sue and be sued for a tort committed to and by another?

44. Can a person ever be made liable for damage which is not the legal consequence of his own acts, and, if so, when?

45. What are the requisites of a valid ratification of tort?

46. How would you qualify the statement that a master is liable for the torts of his servant?

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47. On what principle is a master held liable for the acts of his servant? Show by reference to decided cases what acts are not deemed to be done in the course of service.
48. Explain 'common employment'.
49. What is the law with regard to the liability of a principal for the tortious act of his agent?
50. How far is Government liable for the act of its servants?
51. What limitations are there to the maxim *respondeat superior?*
52. Give the meaning of the maxim and cite cases in support of it.
53. When is a master held liable and when not
(*a*) to a third party for the wrongful act of the servant?
(*b*) to a servant for the wrongful act of a fellow servant?
(*c*) to a servant for the wrongful act of the master himself?
54. Is a master liable (*a*) for wilful and deliberate wrongs committed by his servant, (*b*) for frauds of his servant committed without authority.
55. Under what circumstances is a person employing a contractor liable for the contractor's wrongful acts?
56. Discuss the rule that an employer is not liable for the negligence of a contractor employed by him or the contractor's servants.
57. What is the liability of a husband for the torts of his wife?

CHAPTER IX.

58. What remedies are available against a wrong-doer (1) by the act of the party wronged, (2) by the act of the law?
59. What in general is the measure of damages in cases of tort?
60. Damages are of three kinds. Explain concisely the differences between them and illustrate by example. What kind of damages should be awarded in the following cases:—
(1) In an action of assault.
(2) In an action against a railway company for damage done to goods.
(3) In an action against a railway company for injuries to the person arising from the company's negligence.
(4) In an action for libel.
(5) In an action for seduction.
61. Upon what principles are damages assessed in actions in torts of different classes? State how far such principles are in conformity or otherwise with the rules which determine the measure of damages in actions for breaches of contract.
62. "According to the nature of the case an award of nominal damages may be honourable or contumacious to the plaintiff." Explain this.
63. Give instances of cases in which exemplary damages may be awarded.
64. Are there any distinctions between the principles upon which damages are given in actions of contract and in actions of torts?
65. In actions for torts too remote damages will not be awarded. Discuss this question and give examples.
66. Explain and illustrate the maxim "*in jure non remota causa sed proxima spectatur.*"
67. In what circumstances can prospective damages be awarded?
68. On what principle will the Court award injunction or damages in the case of (*a*) a continuing nuisance, (*b*) obstruction of ancient lights? What rule is adopted in the awarding of damages for injury to property?
69. When will a Court grant an injunction?
70. Mention the qualifications which have been engrafted on the rule that one wrong-doer cannot claim contribution from another. Give examples.
71. What are the respective liabilities of joint wrong-doers to the person wronged, and what are the rules as to contribution and indemnity between the joint wrong-doers themselves?
72. A joint decree is passed against A and B in consequence of a tort committed by them. Under what circumstances will they have a right of contribution against each other? and what will be a successful defence in a suit brought to claim such a contribution?

73. What was decided in the case of *Merryweather* v. *Nixon?* How has this case been recently commented on? With what limitation has its authority been accepted by modern English and Indian decisions?

74. What are the exceptions to the rule that there is no contribution between wrong-doers?

75. A doctor travelling by railway is injured in an accident. Under what circumstances will he get damages from the company, and, if he is awarded heavy damages on the ground that he is permanently disabled from practising, has the company any remedy if he afterwards recovers sufficiently to carry on his profession? If he got damages for temporary disablement and afterwards becomes totally disabled, can he bring a fresh action?

CHAPTER X.

76. Classify torts according to their nature. Give an instance of each class and show why such classification is of importance.

77. Enumerate and explain the different forms of trespass to the person.

78. Classify the torts recognized in English law, according to the moral character of the act.

79. State what, if any, is the common basis of all torts, and suggest any scheme for classifying particular torts according to the elements they have in common. Give in a tabular form the leading heads of the Law to Torts as commonly received in England, giving instances, and the character.

CHAPTER XI.

80. Distinguish between 'assault' and 'battery.'

81. Mention the several valid defences which may be set up to an action for damages for assault.

82. Under what circumstances will the plea of self-defence be an answer to an action for assault?

83. Explain the expression *son assault demesne.*

84. How far, if at all, will the plea avail in an action for assault and battery that the plaintiff first assaulted and commenced the fight?

85. In what cases is a mere menace actionable?

CHAPTER XII.

86. What is necessary to prove in an action for false imprisonment?

87. What defences may be made to a suit for false imprisonment?

88. Compare the powers of a constable with those of a private individual under the common law of England to make an arrest in cases of felony and affray.

89. What should a plaintiff prove in an action for malicious arrest?

CHAPTER XIII.

90. Discuss and explain the doctrine that a man utters defamatory matter at his own peril.

91. State in what respects the liability of a person for defamation in an action of tort differs from the liability in a criminal prosecution.

92. Define libel and slander. What is the law in regard to actions for damages arising therefrom in the Presidency-towns and in the mofussil?

93. What is the difference between libel and slander? What proofs must be adduced by the plaintiff to prove his case in a suit for libel, and how may the defendant defend himself?

94. It is a rule of law that verbal slander must have caused actual damage in order to be actionable. State the exceptions, if any, to this rule and the reason for the exceptions, illustrating your answer by examples.

95. Is there any difference between the Indian and the English law on the subject of slander?

96. What place has "malice" in the law of libel? Under what circumstances is proof of actual malice necessary in an action for libel? When may malice be inferred? When must it be proved?

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72. A joint decree is passed against A and B in consequence of a tort committed by them. Under what circumstances will they have a right of contribution against each other? and what will be a successful defence in a suit brought to claim such a contribution?

116. Is it a tort to induce a person (*a*) to break a contract?, (*b*) to refrain from making a contract?

117. State the elements which are necessary to render an action for procuring a breach of contract maintainable.

CHAPTER XVI.

118. Define "possession", and state what is the law in regard to the acquisition of possession by a trespasser, and the right of the landowner to expel the trespasser by force, or forcibly to re-enter on the land?

119. Write a short note upon what constitutes a trespass upon real property and in what respects it differs from a criminal trespass.

120. Can there be trespass committed by one tenant in common against another, and, if so, in what cases?

121. What are the injuries to real property in respect of which
(*a*) the tenant can sue the wrong-doer?
(*b*) the landlord can sue the wrong-doer?
(*c*) both the landlord and the tenant can sue the trespasser?
(*d*) the reversioner can sue the wrong-doer?
Illustrate your answer by examples.

122. State what you know of the doctrine of *distress damage feasant* and contrast it with *distress for rent.*

123. How may a landlord be guilty of trespass in distraining for arrears of rent due to him?

124. How far is force justifiable (1) to prevent, or (2) to remedy, trespass to land?

125. In an action for trespass
(*a*) state, with reasons, under what circumstance or circumstances, if at all, will the plea of *jus tertii* prevail or fail, and
(*b*) mention what other defence or defences may be available.

126. Within what limits does the right of self-defence excuse an act which would otherwise amount to a trespass?

127. What is meant by (1) an action for trespass; (2) an action of ejectment?

128. State fully in what cases a sheriff may justify breaking open the outer doors of a dwelling-house in order to execute a writ.

129. What rule is adopted in the awarding of damages for injury to property?

130. What is meant by trespass *ab initio?* Explain fully the law on the subject and refer to any decided cases you know bearing on the question.

131. What important principles were laid down in the *Six Carpenters' case* and in *Semayne's* case? State the qualifications with which they are applied.

132. Define and classify 'waste'.

133. What rights, if any, has A (*i*) to have his land supported by that of his neighbour, (*ii*) to have his building supported by his neighbour's land, (*iii*) to have his land and building supported by the land and buildings of his neighbour, (*iv*) to have his land or buildings supported by the subterranean water under his neighbour's land? Quote any cases you know on these points.

134. A dug a trench close to the boundary of B's land. B's buildings were injured by consequent subsidence of the soil. Discuss the liability of A for the injury so done.

135. Where the surface and sub-soil of land are vested in different persons, what reciprocal obligation does the law impose on these persons? Cite cases on this point.

136. What are the rights of riparian proprietors on the same and on different sides of a fordable stream?

137. Underneath a large tract of land there is a quantity of subterranean water. The owners of the surface have wells of various depths by means of which the water can be raised to the surface. What are the rights and duties of those owners among themselves in respect of their use of their respective wells?

138. Point out the distinction between the right of a man to water flowing in a natural channel through his land, and water reaching it through an artificial watercourse.

139. State the nature and extent of rights to appropriate the water of—

(*i*) natural streams running in defined channels above-ground;
(*ii*) underground water running in defined current;
(*iii*) underground water percolating through the soil;
(*iv*) surface water running in no defined channel.

Cite leading cases in regard to subterranean water.

140. Is actual damage a necessary part of the cause of action in a suit for disturbance of an easement of light?

141. Is there any difference on this point between the English law and the law as contained in the Indian Easements Act? Cite recent English and Indian cases.

142. State the various ways in which a right to the use of light and air for buildings can be (1) acquired, and (2) lost, in India.

143. Explain the expressions 'disturbance of common', 'disturbance of market', 'a fishery'.

CHAPTER XVII.

144. Define 'conversion'. Mention the facts which the plaintiff is bound to establish in an action of trover.

145. Explain the distinction between an action for the wrongful detention of goods and an action for conversion of goods.

146. Give the meaning, and cite cases in support, of the maxim *omnia presumuntur contra spoliatorem.*

147. State the points of distinction between trespass and conversion.

148. In what cases is an innocent purchaser of goods held liable for conversion?

149. What is meant by (1) action of *trover,* (2) action of *detinue,* and (3) action of *replevin?*

CHAPTER XVIII.

150. Explain the term "slander of title", and state what facts must be proved by the plaintiff in an action for the same.

151. State what, if any, difference exists between the English and the Indian law on the subject.

152. What was the old law regarding action for "slander of title", and explain the gradual development of this branch of the law, quoting the leading cases thereon.

153. Is it open to the member of a Trade Union to prevent another member from seeking employment in contravention of the rules of the Union: the rules authorized them to prevent a member from doing so?

154. A, a philanthropist, agrees to assist B, a poor man, to assert B's claim for property against a person C, alleged to have wrongfully dispossessed B. Consider the effect of the arrangement under the English and the Indian law.

155. Give a short history of the origin, the gradual development, and the modern doctrines of law, as settled either by decided cases, or statutory enactments, in respect of actions for injuries arising from fraudulent combinations and conspiracies whether by false prosecutions or otherwise.

156. The members of a Trade Union induced certain traders to break their contracts with the plaintiff so as to compel him to comply with the Union rules. What remedy, if any, has the plaintiff against the unionists?

CHAPTER XIX.

157. What monopolies exist in British India, and what acts constitute violations of the rights respectively?

158. What are the essentials of a right to the use of a trade-mark?

159. To what limitations is the right of property in the use of a trade-mark subject?

160. What is necessary to constitute piracy of a trade-mark?

161. What is the measure of damages in an action for the infringement of plaintiff's trade-mark by defendant, causing loss of profit to plaintiff not by diminishing the amount of goods sold by plaintiff but by causing the goods to be sold at a diminished price?

162. What must the plaintiff prove in

(i) a suit for damages, and
(ii) a suit for an injunction for an infringement of his right to trade-mark?

CHAPTER XX.

163. Define 'negligence'. Criticise the definition given by Baron Alderson.

164. What are the principal rules regarding liability for breaches of a statutory duty towards the public? Does the fact that a statute provides a particular remedy for its breach entirely take away the right of action?

165. How far can a railway company, sued for damages caused by the working of its line, shelter itself behind the authority conferred on it by the Legislature? Illustrate your answer by a few well-known cases.

166. What is meant by contributory negligence? Discuss the doctrine briefly.

(a) In what circumstances, if at all, is the contributory negligence of a third party not a good defence?

(b) In what circumstances, if at all, is the contributory negligence of the plaintiff not a good defence?

Upon what general principles are cases involving questions of contributory negligence by children decided?

167. Point out clearly the distinction between cases of contributory negligence and cases which fall within the maxim *volenti non fit injuria*. Illustrate your remarks by reference to decided cases.

168. State the class of cases wherein contributory negligence would afford no excuses in an action for tort for damages. What is the law when a danger is caused to a child—

(a) by the negligence of its parent or guardian,
(b) by the child itself independently of any negligence in its parent or guardian?

169. Explain the doctrine of 'identification' and state how it has been affected by recently decided cases. What is the true rule in Court where damage has been sustained by the concurrent negligence of two or more persons.

170. Is an owner of land, upon which water is stored, liable, and if so, to what extent, for injury caused by the escape of such water?

171. With what limitations, statutory or otherwise, has the maxim *sic utere tuo ut alienum non loedas* been acted on in civil Courts?

172. Three persons, a guest, a servant, and a friend, of the master of an hotel enter it at the same time and are injured by the accidental falling of a beam. What liability does the master of the hotel incur?

173. What is a licence? What are the rights and liabilities of a licensee? Distinguish licence from grant. Illustrate your remarks by reference to decided cases.

174. In what respects is a licensee in a better position than a trespasser, and in a worse position than a person present on lawful business when he sustains injury on the premises of another?

175. Explain what is meant by a common carrier, and the extent of his liability for damage or loss to goods.

176. What is the common law liability of carriers (1) by land, and (2) by sea?

177. What is the liability of carriers of passengers?

178. State shortly the nature and extent of the liability of rail panies as carriers (1) of goods, and (2) of passengers.

179. Compare and contrast the liabilities of a co of an ordinary carrier for hire.

180. What is the difference between the liability of innkeepers and that of lodging-house keepers for the loss of the goods of a guest and lodger respectively?

181. What is the liability of an hotel-keeper when his guest's property has been stolen (*a*) while it was in the hotel-keeper's custody; (*b*) while it was in his guest's custody, but on the hotel premises.

182. What is the liability of persons keeping animals either wild or domestic for injuries done by them?

183. Had the lions in Mr. Fillis' circus escaped during a railway accident and done damage, could the persons damaged have recovered (1) from Mr. Fillis, (2) from the railway company? Give reasons for your answer.

184. Discuss the liability of a man on whose property a fire breaks out for damage which that fire may cause to his neighbour.

185. Through the negligence of servants of the tenant of a house, the house is set fire to and burnt down. Is the tenant liable to the landlord for the damage done?

186. Explain what is meant by *scienter*.

187. In which of the following actions can a man succeed, and why? And what must he prove in each in order to succeed?

(1) Against the owner of a dog which has bitten him.

(2) Against the owner of a monkey which has escaped from custody and injured him.

(3) Against the owner of a runaway horse which has knocked him down.

(4) Against a railway company where he has sustained injury from an accident by a defect in the wheels of the carriage in which he was a passenger.

CHAPTER XXI.

188. Distinguish between a private and a public nuisance, and state the facts which the plaintiff is bound to prove in an action for nuisance. Give instances of a public and a private nuisance and also instances in which the same act is both a public and a private nuisance.

189. "What would be a nuisance in one locality may not be one in another." Comment briefly upon the accuracy of this proposition.

190. What is the law in regard to a private individual's right of action in respect of a public nuisance which causes damage to him?

191. What is the distinction between trespass and nuisance? Can the same act amount to both, and, if so, give instances?

192. When can a reversioner sue the wrong-doer in cases of nuisance? Give instances.

193. State the nature and extent of the civil liability of landlords and tenants for nuisance on the demised premises.

194. What is the law with regard to the respective liabilities of the landlord and tenant in respect of injuries sustained by a stranger resulting from the premises being out of repair?

195. On what principle are damages usually assessed in cases of continuing nuisance?

196. What is meant by a "continuing injury"? What modes of redress can the injured person exercise in respect of it?

197. Explain the respective liabilities of the landlord and of the tenant for nuisances upon the demised premises.

198. Who is liable for a nuisance?

199. What are the remedies for a nuisance?

CHAPTER XXII.

200. What is an action for deceit? What are the facts necessary for a plaintiff to prove in order successfully to sustain an action for deceit?

201. Is absence of profit a good defence to an action for deceit?

202. When will an action lie in cases of fraudulent statements and fraudulent silence?

203. In an action of deceit, explain the liability, if any, of a principal in respect of a representation voluntarily made by the agent stating the grounds for the existence or non-existence of any liability.

(*i*) Where the representation is false within the knowledge of the principal, but not of the agent.

(*ii*) Where the representation is false within the knowledge of the agent but not of the principal.

204. What did the House of Lords decide in the case of *Derry* v. *Peek*?

CHAPTER XXIII.

205. Explain the term "tort founded on contract". Give instances

206. Is privity necessary to support an action in tort?

207. "Wherever a duty is imposed on a person by contract or otherwise and that duty is violated, any one who is injured by the violation of it may have a remedy against the wrong-doer." Comment on the proposition, and quote any cases you know in illustration.

208. When does it happen that one and the same set of facts give rise both to an action in contract as well as in tort? Show how fraud may give rise to such alternative remedy.

209. Explain.—"There may be two causes of action with a common plaintiff, or the same facts may give B a remedy in contract against X, and another a remedy in tort against Y".

210. Illustrate by examples that the law of contracts and of torts may afford concurrent remedies, in the alternative, to the injured party in respect of the same wrongful act of the defendants.

211. Give two examples—

(*a*) of a tort arising out of a breach of contract but yet independent of it; and

(*b*) of a tort involving the breach of contract but yet independent of it.

212. When, if ever, is one railway company liable for accidents happening on another company's line? Give reasons.

APPENDIX II.

THE INDIAN EASEMENTS ACT

V OF 1882.

An Act to define and amend the law relating to Easements and Licenses.

Preamble. WHEREAS it is expedient to define and amend the law relating to Easements and Licenses; It is hereby enacted as follows:—

PRELIMINARY.

Short title. 1. This Act may be called The Indian Easements Act, 1882.

Local extent. It extends to the territories respectively administered by the Governor of Madras in Council and the Chief Commissioners of the Central Provinces and Coorg,

Commencement. and it shall come into force on the first day of July 1882.

Savings. 2. Nothing herein contained shall be deemed to affect any law not hereby expressly repealed; or to derogate from—

(a) any right of the Crown to regulate the collection, retention and distribution of the water of rivers and streams flowing in natural channels, and of natural lakes and ponds, or of the water flowing, collected, retained or distributed in or by any channel or other work constructed at the public expense for irrigation;

(b) any customary or other right (not being a license) in or over immoveable property which the Crown, the public or any person may possess irrespective of other immoveable property; or

(c) any right acquired, or arising out of a relation created, before this Act comes into force.

Construction of certain references to Act XV of 1877 and Act IX of 1871. 3. All references in any Act or Regulation to sections 26 and 27 of the Indian Limitation Act, 1877, or to sections 27 and 28 of Act No. IX of 1871, shall, in the territories to which this Act extends, be read as made to sections 15 and 16 of this Act.

CHAPTER I.

OF EASEMENTS GENERALLY.

"Easement" defined. 4. An easement is a right which the owner or occupier of certain land possesses, as such, for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and continue to prevent something being done, in or upon, or in respect of, certain other land not his own.

The land for the beneficial enjoyment of which the right exists is called the dominant heritage, and the owner or occupier thereof the dominant owner; the land on which the liability is imposed is called the servient heritage, and the owner or occupier thereof the servient owner.

Dominant and servient heritages and owners.

Explanation.—In the first and second clauses of this section the expression "land" includes also things permanently attached to the earth; the expression "beneficial enjoyment" includes also possible [illegible] remote advantage and even a mere amenity; and the expression "[illegible] something" includes removal and appropriation by the [illegible] for the beneficial enjoyment of the dominant heritage, of [illegible] soil of the servient heritage or anything growing or [illegible]

Illustrations.

(*a*) *A*, as the owner of a certain house, has a right of [illegible] neighbour *B's* land for purposes connected with the beneficial [illegible] house. This is an easement.

(*b*) *A*, as the owner of a certain house, has the right to [illegible] *B's* land and to take water for the purposes of his household [illegible] in. This is an easement.

(*c*) *A*, as the owner of a certain house, has the right to [illegible] *B's* stream to supply the fountains in the garden attached to [illegible] an easement.

(*d*) *A*, as the owner of a certain house and farm, [illegible] certain number of his own cattle on *B's* or to take, for the [illegible] used in the house, by himself, his family, guests, lodgers [illegible] fish out of *C's* tank, or timber out of *D's* wood, or to [illegible] manuring his land, the leaves which have fallen from the [illegible] These are easements.

(*e*) *A* dedicates to the public the rights to occupy the [illegible] land for the purpose of passing and re-passing. This right [illegible]

(*f*) *A* is bound to cleanse a water-course running [illegible] it free from obstruction for the benefit of *B*, a lower [illegible] an easement.

Continuous and discontinuous, apparent and non-apparent, easements.

5. Easements are either continuous or discontinuous, apparent or non-apparent.

A continuous easement is [illegible] or may be continual without the act of man. [illegible]

A discontinuous easement is one that needs the act of man for its enjoyment.

An apparent easement is one the existence of which is shown by some permanent sign which, upon careful inspection by a competent person, would be visible to him.

A non-apparent easement is one that has no such sign.

Illustrations.

(*a*) A right annexed to *B's* house to receive light by the windows without obstruction by his neighbour *A*. This is continuous [illegible]

(*b*) A right of way annexed to *A's* house over *B's* land. This is a [illegible] tinuous easement.

(*c*) Rights annexed to *A's* land to lead water [illegible] an aqueduct and to draw off water thence by a drain [illegible] The drain [illegible]

covered upon careful inspection by a person conversant with such matters. These are apparent easements.

(*d*) A right annexed to *A's* house to prevent *B* from building on his own land. This is a non-apparent easement.

Easement for limited time or on condition.

6. An easement may be permanent or for a term of years or other limited period, or subject to periodical interruption, or exercisable only at a certain place, or at certain times, or between certain hours, or for a particular purpose, or on condition that it shall commence or become void or voidable on the happening of a specified event or the performance or non-performance of a specified act.

Easements restrictive of certain rights.

7. Easements are restrictions of one or other of the following rights (namely):—

Exclusive right to enjoy.

(*a*) The exclusive right of every owner of immoveable property (subject to any law for the time being in force) to enjoy and dispose of the same and all products thereof and accessions thereto;

Rights to advantages arising from situation.

(*b*) the right of every owner of immoveable property (subject to any law for the time being in force) to enjoy without disturbance by another the natural advantages arising from its situation.

Illustrations of the rights above referred to.

(*a*) The exclusive right of every owner of land in a town to build on such land, subject to any municipal law for the time being in force.

(*b*) The right of every owner of land that the air passing thereto shall not be unreasonably polluted by other persons.

(*c*) The right of every owner of a house that his physical comfort shall not be interfered with materially and unreasonably by noise or vibration caused by any other person.

(*d*) The right of every owner of land to so much light and air as pass vertically thereto.

(*e*) The right of every owner of land, that such land, in its natural condition, shall have the support naturally rendered by the subjacent and adjacent soil of another person.

Explanation.—Land is in its natural condition when it is not excavated and not subjected to artificial pressure; and the "subjacent and the adjacent soil" mentioned in this illustration means only such soil as in its natural condition would support the dominant heritage in its natural condition.

(*f*) The right of every owner of land that, within his own limits, the water which naturally passes or percolates by, over or through his land shall not, before so passing or percolating, be unreasonably polluted by other persons.

(*g*) The right of every owner of land to collect and dispose within his own limits of all water under the land which does not pass in a defined channel and all water on its surface which does not pass in a defined channel.

(*h*) The right of every owner of land that the water of every natural stream which passes by, through or over his land in a defined natural channel shall be allowed by other persons to flow within such owner's limits without interruption and without material alteration in quantity, direction, force or temperature; the right of every owner of land abutting on a natural lake or pond into or out of which a natural stream flows, that the water of such lake or pond shall be allow-

ed by other persons to remain within such owner's limits without material alteration in quantity or temperature.

(i) The right of every owner of upper land that water naturally rising in, or falling on, such land, and not passing in defined channels, shall be allowed by the owner of adjacent lower land, to run naturally thereto.

(j) The right of every owner of land abutting on a natural stream, lake or pond to use and consume its water for drinking, household purposes and watering his cattle and sheep, and the right of every such owner to use and consume the water for irrigating such land, and for the purposes of any manufactory situate thereon, provided that he does not thereby cause material injury to other like owners.

Explanation.—A natural stream is a stream, whether permanent or intermittent, tidal or tideless, on the surface of land or underground, which flows by the operation of nature only and in a natural and known course.

CHAPTER II.

THE IMPOSITION, ACQUISITION AND TRANSFER OF EASEMENTS.

Who may impose easements.

8. An easement may be imposed by any one in the circumstances, and to the extent, in and to which he may transfer his interest in the heritage on which the liability is to be imposed.

Illustrations.

(a) *A* is tenant of *B's* land under a lease for an unexpired term of twenty years, and has power to transfer his interest under the lease. *A* may impose an easement on the land to continue during the time that the lease exists or for any shorter period.

(b) *A* is tenant for his life of certain land with remainder to *B* absolutely. *A* cannot, unless with *B's* consent, impose an easement thereon which will continue after the determination of his life interest.

(c) *A*, *B* and *C* are co-owners of certain land. *A* cannot, without the consent of *B* and *C*, impose an easement on the land or on any part thereof.

(d) *A* and *B* are lessees of the same lessor, *A* of a field *X* for a term of five years, and *B* of a field *Y* for a term of ten years. *A's* interest under his lease is transferable; *B's* is not. *A* may impose on *X*, in favour of *B*, a right of way terminable with *A's* lease.

Servient owners.

9. Subject to the provisions of section 8, a servient owner may impose on the servient heritage any easement that does not lessen the utility of the existing easement. But he cannot, without the consent of the dominant owner, impose an easement on the servient heritage which would lessen such utility.

Illustrations.

(a) *A* has, in respect of his mill, a right to the uninterrupted flow thereto, from sunrise to noon, of the water of *B's* stream. *B* may grant *C* the right to divert the water of the stream from noon to sunset: Provided that *A's* supply is not thereby diminished.

(b) *A* has, in respect of his house, a right of way over *B's* land. *B* may grant to *C*, as the owner of a neighbouring farm, the right to feed his cattle on the grass growing on the way: Provided that *A's* right of way is not thereby obstructed.

Lessor and mortgagor.

10. Subject to the provisions of section 8, a lessor may impose, on the property leased, any easement that does not derogate from the rights of the lessee as such, and a mortgagor may impose, on the property mortgaged, any easement *that does not render the security insufficient. But a lessor or mortgagor* cannot, without the consent of the lessee or mortgagee, impose any other easement on such property, unless it be to take effect on the termination of the lease or the redemption of the mortgage.

Explanation.—A security is insufficient within the meaning of this section unless the value of the mortgaged property exceeds by one-third, or, if consisting of buildings, exceeds by one-half, the amount for the time being due on the mortgage.

Lessee.

11. No lessee or other person having a derivative interest may impose on the property held by him as such an easement to take effect after the expiration of his own interest, or in derogation of the right of the lessor or the superior proprietor.

Who may acquire easements.

12. An easement may be acquired by the owner of the immoveable property for the beneficial enjoyment of which the right is created, or on his behalf, by any person in possession of the same.

One of two or more co-owners of immoveable property, may, as such, with or without the consent of the other or others, acquire an easement for the beneficial enjoyment of such property.

No lessee of immoveable property can acquire, for the beneficial enjoyment of other immoveable property of his own, an easement in or over the property comprised in his lease.

Easements of necessity and *quasi* easements.

13. Where one person transfers or bequeaths immoveable property to another,—

(*a*) if an easement in other immoveable property of the transferor or testator is necessary for enjoying the subject of the transfer or bequest, the transferee or legatee shall be entitled to such easement; or,

(*b*) if such an easement is apparent and continuous and necessary for enjoying the said subject as it was enjoyed when the transfer or bequest took effect, the transferee or legatee shall, unless a different intention is expressed or necessarily implied, be entitled to such easement;

(*c*) if an easement in the subject of the transfer or bequest is necessary for enjoying other immoveable property of the transferor or testator, the transferor or the legal representative of the testator shall be entitled to such easement; or,

(*d*) if such an easement is apparent and continuous and necessary for enjoying the said property as it was enjoyed when the transfer or bequest took effect, the transferor, or the legal representative of the testator, shall, unless a different intention is expressed or necessarily implied, be entitled to such easement.

Where a partition is made of the joint property of several persons—

(*e*) if an easement over the share of one of them is necessary for enjoying the share of another of them, the latter shall be entitled to such easement, or

(*f*) if such an easement is apparent and continuous and necessary for enjoying the share of the latter as it was enjoyed when the partition took effect, he shall, unless a different intention is expressed or necessarily implied, be entitled to such easement.

The easements mentioned in this section, clauses (*a*), (*c*) and (*e*) are called easements of necessity

Where immoveable property passes by operation of law, the persons from and to whom it so passes are, for the purpose of this section, to be deemed, respectively, the transferor and transferee.

Illustrations.

(*a*) *A* sells *B* a field then used for agricultural purposes only. It is inaccessible except by passing over *A's* adjoining land or by trespassing on the land of a stranger. *B* is entitled to a right of way, for agricultural purposes only, over *A's* adjoining land to the field sold.

(*b*) *A*, the owner of two fields, sells one to *B* and retains the other. The field retained was at the date of the sale used for agricultural purposes only and is inaccessible except by passing over the field sold to *B*. *A* is entitled to a right of way, for agricultural purposes only, over *B's* field to the field retained.

(*c*) *A* sells *B* a house with windows overlooking *A's* land, which *A* retains. The light which passes over *A's* land to the windows is necessary for enjoying the house as it was enjoyed when the sale took effect. *B* is entitled to the light, and *A* cannot afterwards obstruct it by building on his land.

(*d*) *A* sells *B* a house with windows overlooking *A's* land. The light passing over *A's* land to the windows is necessary for enjoying the house as it was enjoyed when the sale took effect. Afterwards *A* sells the land to *C*. Here *C* cannot obstruct the light by building on the land, for he takes it subject to the burdens to which it was subject in *A's* lands.

(*e*) *A* is the owner of a house and adjoining land. The house has windows overlooking the land. *A* simultaneously sells the house to *B* and the land to *C*. The light passing over the land is necessary for enjoying the house as it was enjoyed when the sale took effect. Here *A* impliedly grants *B* a right to the light, and *C* takes the land subject to the restriction that he may not build so as to obstruct such light.

(*f*) *A* is the owner of a house and adjoining land. The house has windows overlooking the land. *A* retaining the house sells the land to *B*, without expressly reserving any easement. The light passing over the land is necessary for enjoying the house as it was enjoyed when the sale took effect. *A* is entitled to the light, and *B* cannot build on the land so as to obstruct such light.

(*g*) *A*, the owner of a house, sells *B* a factory built on adjoining land. *B* is entitled, as against *A*, to pollute the air, when necessary, with smoke and vapours from the factory.

(*h*) *A*, the owner of two adjoining houses, *Y* and *Z*, sells *Y* to *B*, and retains *Z*. *B* is entitled to the benefit of all the gutters and drains common to the two houses and necessary for enjoying *Y* as it was enjoyed when the sale took effect and *A* is entitled to the benefit of all the gutters and drains common to the two houses and necessary for enjoying *Z* as it was enjoyed when the sale took effect.

(*i*) *A*, the owner of two adjoining buildings, sells one to *B* retaining the other. *B* is entitled to a right to lateral support from *A's* buildings and *A* is entitled to a right to lateral support from *B's* building.

(*j*) *A*, the owner of two adjoining buildings, sells one to *B* and the other to *C*. *C* is entitled to lateral support from *B's* building, and *B* is entitled to lateral support from *C's* building.

(*k*) *A* grants lands to *B* for the purpose of building a house thereon. *B* is entitled to such amount of lateral and subjacent support from *A's* land as is necessary for the safety of the house.

(*l*) Under the Land Acquisition Act, 1870, a Railway Company compulsorily acquires a portion of *B's* land for the purpose of making a siding. The Company is entitled to such amount of lateral support from *B's* adjoining land as is essential for the safety of the siding.

(*m*) Owing to the partition of joint property, *A* becomes the owner of an upper room in a building, and *B* becomes the owner of the portion of the building immediately beneath it. *A* is entitled to such amount of vertical support from *B's* portion as is essential for the safety of the upper room.

(*n*) *A* lets a house and grounds to *B* for a particular business. *B* has no access to them other than by crossing *A's* land. *B* is entitled to a right of way over that land suitable to the business to be carried on by B in the house and grounds.

Direction of way of necessity.

14. When a right to a way of necessity is created under section 13, the transferor, the legal representative of the testator, or the owner of the share over which the right is exercised, as the case may be, is entitled to set out the way; but it must be reasonably convenient for the dominant owner.

When the person so entitled to set out the way refuses or neglects to do so, the dominant owner may set it out.

Acquisition by prescription.

15. Where the access and use of light or air to and for any building have been peaceably enjoyed therewith, as an easement, without interruption, and for twenty years, and where support from one person's land, or things affixed thereto, has been peaceably received by another person's land subjected to artificial pressure, or by things affixed thereto, as an easement without interruption, and for twenty years,

and where a right of way or any other easement has been peaceably and openly enjoyed by any person claiming title thereto, as an easement, and as of right, without interruption, and for twenty years,

the right to such access and use of light or air, support or other easement shall be absolute.

Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested.

Explanation I.—Nothing is an enjoyment within the meaning of this section when it has been had in pursuance of an agreement with the owner or occupier of the property over which the right is claimed, and it is apparent from the agreement that such right has not been granted as an easement, or, if granted as an easement, that it has been granted for a limited period, or subject to a condition on the fulfilment of which it is to cease.

Explanation II.—Nothing is an interruption within the meaning of this section unless where there is an actual cessation of the enjoyment by reason of an obstruction by the act of some person other than the claimant, and unless such obstruction is submitted to or acquiesced in for one year after the claimant has notice thereof and of the person making or authorizing the same to be made.

Explanation III.—Suspension of enjoyment in pursuance of a contract between the dominant and servient owners is not an interruption within the meaning of this section.

Explanation IV.—In the case of an easement to pollute water, the said period of twenty years begins when the pollution first prejudices perceptibly the servient heritage.

When the property over which a right is claimed under this section belongs to the Crown, this section shall be read as if for the words "twenty years" the words "sixty years" were substituted.

Illustrations.

(*a*) A suit is brought in 1883 for obstructing a right of way. The defendant admits the obstruction, but denies the right of way. The plaintiff proves that the right was peaceably and openly enjoyed by him, claiming title thereto as an easement and as of right, without interruption, from 1st January, 1862, to 1st January, 1882. The plaintiff is entitled to judgment.

(*b*) In a like suit the plaintiff shows that the right was peaceably and openly enjoyed by him for twenty years. The defendant proves that for a year of that time the plaintiff was entitled to possession of the servient heritage as lessee thereof and enjoyed the right as such lessee. The suit shall be dismissed, for the right of way has not been enjoyed "as an easement" for twenty years.

(*c*) In a like suit the plaintiff shows that the right was peaceably and openly enjoyed by him for twenty years. The defendant proves that the plaintiff on one occasion during the twenty years had admitted that the user was not of right and asked his leave to enjoy the right. The suit shall be dismissed, for the right of way has not been enjoyed "as of right" for twenty years.

Exclusion in favour of reversioner of servient heritage.

16. Provided that, when any land upon, over or from which any easement has been enjoyed or derived has been held under or by virtue of any interest for life or any term of years exceeding three years from the granting thereof, the time of the enjoyment of such easement during the continuance of such interest or term, shall be excluded in the computation of the said last mentioned period of twenty years, in case the claim is, within three years next after the determination of such interest or term, resisted by the person entitled, on such determination, to the said land.

Illustration.

A sues for a declaration that he is entitled to a right of way over *B's* land. *A* proves that he has enjoyed the right for twenty-five years; but *B* shows that during ten of these years *C* had a life-interest in the land; that on *C's* death *B* became entitled to the land; and that within two years after *C's* death he contested *A's* claim to the right. The suit must be dismissed, as *A*, with reference to the provisions of this section, has only proved enjoyment for fifteen years.

Rights which cannot be acquired by prescription.

17. Easements acquired under section 15 are said to be acquired by prescription and are called prescriptive rights.

None of the following rights can be so acquired :—

(*a*) a right which would tend to the total destruction of the subject of the right, or the property on which, if the acquisition were mad liability would be imposed;

(*b*) a right to the free passage of light or air to an open space of ground;

(*c*) a right to surface-water not flowing in a stream and not permanently collected in a pool, tank or otherwise;

(*d*) a right to underground water not passing in a defined channel.

Customary easements.

18. An easement may be acquired in virtue of a local custom. Such easements are called customary easements.

Illustrations.

(*a*) By the custom of a certain village every cultivator of village land is entitled, as such, to graze his cattle on the common pasture. *A*, having become the tenant of a plot of uncultivated land in the village, breaks up and cultivates that plot. He thereby acquires an easement to graze his cattle in accordance with the custom.

(*b*) By the custom of a certain town no owner or occupier of a house can open a new window therein so as substantially to invade his neighbour's privacy. *A* builds a house in the town near *B's* house. *A* thereupon acquires an easement that *B* shall not open new windows in his house so as to command a view of the portion of *A's* house which are ordinarily excluded from observation, and *B* acquires a like easement with respect to *A's* house.

Transfer of dominant heritage passes easement.

19. Where the dominant heritage is transferred or devolves, by act of parties or by operation of law, the transfer or devolution shall, unless a contrary intention appears, be deemed to pass the easement to the person in whose favour the transfer or devolution takes place.

Illustration.

A has certain land to which a right of way is annexed. *A* lets the land to *B* for twenty years. The right of way vests in *B* and his legal representatives so long as the lease continues.

CHAPTER III.

THE INCIDENTS OF EASEMENTS.

Rules controlled by contract or title.

20. The rules contained in this Chapter are controlled by any contract between the dominant and servient owners relating to the servient heritage, and by the provisions of the instrument of decree, if any, by which the easement referred to was imposed.

Incidents of customary easements.

And, when any incident of any customary easement is inconsistent with such rules, nothing in this chapter shall affect such incident.

Bar to use unconnected with enjoyment.

21. An easement must not be used for any purpose not connected with the enjoyment of the dominant heritage.

Illustrations.

(*a*) *A*, as owner of a farm *Y*, has a right of way over *B*'s land to *Y*. Lying beyond *Y*, *A* has another farm *Z*, the beneficial enjoyment of which is not necessary for the beneficial enjoyment of *Y*. He must not use the easement for the purpose of passing to and from *Z*.

(*b*) *A*, as owner of a certain house, has a right of way to and from it. For the purpose of passing to and from the house the right may be used, and not only by *A* but by the members of his family, his guests, lodgers, servants, workmen, visitors and customers, for this is a purpose connected with the enjoyment of the dominant heritage. So, if *A* lets the house, he may use the right of way for the purpose of collecting the rent and seeing that the house is kept in repair.

Exercise of easement.

Confinement of exercise of easement.

22. The dominant owner must exercise his right in the mode which is least onerous to the servient owner; and, when the exercise of an easement can without detriment to the dominant owner be confined to a determinate part of the servient heritage, such exercise shall, at the request of the servient owner, be so confined.

Illustrations

(*a*) *A* has a right of way over *B*'s field *A* must enter the way at either end, and not at any intermediate point.

(*b*) *A* has a right annexed to his house to cut thatching grass in *B*'s swamp. *A*, when exercising the easement, must cut the grass so that the plants may not be destroyed.

Right to alter mode of enjoyment.

23. Subject to the provisions of section 22, the dominant owner may, from time to time, alter the mode and place of enjoying the easement, provided that he does not thereby impose any additional burden on the servient heritage.

Exception.—The dominant owner of a right of way cannot vary his line of passage at pleasure, even though he does not thereby impose any additional burden on the servient heritage.

Illustrations.

(*a*) *A*, the owner of a saw-mill, has a right to a flow of water sufficient to work the mill. He may convert the saw-mill into a corn-mill, provided that it can be worked by the same amount of water.

(*b*) A has a right to discharge on *B*'s land the rain-water from the eaves of *A*'s house. This does not entitle *A* to advance his eaves if, by so doing, he imposes a greater burden on *B*'s land.

(*c*) *A*, as the owner of a paper-mill, acquires a right to pollute a stream by pouring in the refuse-liquor produced by making in the mill paper from rags. He may pollute the stream by pouring in similar liquor produced by making in the mill paper by a new process from bamboos, provided that he does not substantially increase the amount, or injuriously change the nature, of the pollution.

(*d*) *A*, a riparian owner, acquires, as against the lower riparian owners, a prescriptive right to pollute a stream by throwing sawdust into it. This does not entitle *A* to pollute the stream by discharging into it poisonous liquor.

Right to do acts to secure enjoyment.

24. The dominant owner is entitled, as against the servient owner, to do all acts necessary to secure the full enjoyment of the easement; but such acts must be done at such time and in such manner as, without detriment to the dominant owner, to cause the servient owner as little inconvenience as possible; and the dominant owner must repair, as far as practicable, the damage (if any) caused by the act to the servient heritage.

Accessory rights.

Rights to do acts necessary to secure the full ment of an easement are called accessory right

Illustrations.

(*a*) *A* has an easement to lay pipes in *B's* land to convey water to *A's* cistern. *A* may enter and dig the land in order to mend the pipes, but he must restore the surface to its original state.

(*b*) *A* has an easement of a drain through *B's* land. The sewer with which the drain communicates is altered. *A* may enter upon *B's* land and alter the drain, to adapt it to the new sewer provided that he does not thereby impose any additional burden on *B's* land.

(*c*) *A*, *as owner of a certain house, has a right of way over B's land.* The way is out of repair, or a tree is blown down and falls across it. *A* may enter on *B's* land and repair the way or remove the tree from it.

(*d*) *A*, as owner of a certain field, has a right of way over *B's* land. *B* renders the way impassable. *A* may deviate from the way and pass over the adjoining land of *B*, provided that the deviation is reasonable.

(*e*) *A*, as owner of a certain house, has a right of way over *B's* field. *A* may remove rocks to make the way.

(*f*) *A* has an easement of support from *B's* wall. The wall gives way. *A* may enter upon *B's* land and repair the wall.

(*g*) *A* has an easement to have his land flooded by means of a dam in *B's* stream. The dam is half swept away by an inundation. *A* may enter upon *B's* land and repair the dam.

Liability for expenses necessary for preservation of easement.

25. The expenses incurred in constructing works, or making repairs, or doing any other act necessary for the use or preservation of an easement must be defrayed by the dominant owner.

Liability for damage from want of repair.

26. Where an easement is enjoyed by means of an artificial work, the dominant owner is liable to make compensation for any damage to the servient heritage arising from the want of repair of such work.

Servient owner not bound to do anything.

27. The servient owner is not bound to do anything for the benefit of the dominant heritage and he is entitled, as against the dominant owner, to use the servient heritage in any way consistent *with the enjoyment of the easement; but* he must not do any act tending to restrict the easement or to render its exercise less convenient.

Illustrations.

(*a*) *A*, as owner of a house, has a right to lead water and send sewage through *B's* land. *B* is not bound as servient owner to clear the watercourse or scour the sewer.

(*b*) *A* grants a right of way through his land to *B* as owner of a field. *A* may feed his cattle on grass growing on the way, provided that *B's* right of way is not thereby obstructed, but he must not build a wall at the end of his land so as to prevent *B* from going beyond it, nor must he narrow the way so as to render the exercise of the right less easy than it was at the date of the grant.

(*c*) *A*, *in respect of his house, is entitled to an easement of support from B's* wall. *B* is not bound as servient owner to keep the wall standing and in repair. But he must not pull down or weaken the wall so as to make it incapable of rendering the necessary support.

(*d*) *A*, in respect of his mill, is entitled to a watercourse through *B's* land. *B* must not drive stakes so as to obstruct the watercourse.

(c) *A*, in respect of his house, is entitled to a certain quantity of light passing over *B's* land. *B* must not plant trees so as to obstruct the passage to *A's* windows of that quantity of light.

Extent of easements.

28. With respect to the extent of easements and the mode of their enjoyment, the following provisions shall take effect:—

Easement of necessity.

An easement of necessity is co-extensive with the necessity as it existed when the easement was imposed.

Other easements.

The extent of any other easement and the mode of its enjoyment must be fixed with reference to the probable intention of the parties, and the purpose for which the right was imposed or acquired.

In the absence of evidence as to such intention and purpose—

Right of way.

(a) a right of way of any one kind does not include a right of way of any other kind;

Right to light or air acquired by grant.

(b) the extent of a right to the passage of light or air to a certain window, door or other opening, imposed by a testamentary or non-testamentary instrument, is the quantity of light or air that entered the opening at the time the testator died or the non-testamentary instrument was made;

Prescriptive right to light or air.

(c) the extent of a prescriptive right to the passage of light or air to a certain window, door or other opening is that quantity of light or air which has been accustomed to enter that opening during the whole of the prescriptive period irrespectively of the purposes for which it has been used;

Prescriptive right to pollute air and water.

(d) the extent of a prescriptive right to pollute air or water is the extent of the pollution at the commencement of the period of user on completion of which the right arose; and

Other prescriptive rights.

(e) the extent of every other prescriptive right and the mode of its enjoyment must be determined by the accustomed user of the right.

Increase of easement.

29. The dominant owner cannot, by merely altering or adding to the dominant heritage, substantially increase an easement.

Where an easement has been granted or bequeathed so that its extent shall be proportionate to the extent of the dominant heritage, if the dominant heritage is increased by alluvion, the easement is proportionately increased, and, if the dominant heritage is diminished by diluvion, the easement is proportionately diminished.

Save as aforesaid, no easement is affected by any change in the extent of the dominant or the servient heritage.

Illustrations.

(a) *A*, the owner of a mill, has acquired a prescriptive right to divert to his mill part of the water of a stream. *A* alters the machinery of his mill. H cannot thereby increase his right to divert water.

(*b*) *A* has acquired an easement to pollute a stream by carrying on a manufacture on its banks by which a certain quantity of foul matter is discharged into it. *A* extends his works and thereby increases the quantity discharged. He is responsible to the lower riparian owners for injury done by such increase.

(*c*) *A*, as the owner of a farm, has a right to take, for the purpose of manuring his farm, leaves which have fallen from the trees on *B's* land. *A* buys a field and unites it to his farm. *A* is not thereby entitled to take leaves to manure this field.

Partition of dominant heritage.

30. Where a dominant heritage is divided between two or more persons, the easement becomes annexed to each of the shares, but not so as to increase substantially the burden of the servient heritage : provided that such annexation is consistent with the terms of the instrument, decree or revenue proceeding (if any) under which the division was made, and, in the case of prescriptive rights, with the user during the prescriptive period.

Illustrations.

(*a*) A house to which a right of way by a particular path is annexed is divided into two parts, one of which is granted to *A*, the other to *B*. Each is entitled, in respect of his part, to a right of way by the same path.

(*b*) A house to which is annexed the right of drawing water from a well to the extent of fifty buckets a day is divided into two distinct heritages, one of which is granted to *A*, the other to *B*. *A* and *B* are each entitled, in respect of his heritage, to draw from the well fifty buckets a day; but the amount drawn by both must not exceed fifty buckets a day.

(*c*) *A*, having in respect of his house an easement of light, divides the house into three distinct heritages. Each of these continues to have the right to have its windows unobstructed.

Obstruction in case of excessive user.

31. In the case of excessive user of an easement the servient owner may, without prejudice to any other remedies to which he may be entitled, obstruct the user, but only on the servient heritage : provided that such user cannot be obstructed when the obstruction would interfere with the lawful enjoyment of the easement.

Illustration.

A, having a right to the free passage over *B's* land of light to four windows six feet by four, increases their size and number. It is impossible to obstruct the passage of light to the new windows without also obstructing the passage of light to the ancient windows. *B* cannot obstruct the excessive user.

CHAPTER IV.

THE DISTURBANCE OF EASEMENTS.

Right to enjoyment without disturbance.

32. The owner or occupier of the dominant heritage is entitled to enjoy the easement without disturbance by any other person.

Illustration.

A, as owner of a house, has a right of way over *B's* land. *C* unlawfully enters on *B's* land and obstructs *A* in his right of way. *A* may sue *C* for compensation, not for the entry, but for the obstruction.

Suit for disturbance of easement.

33. The owner of any interest in the dominant heritage, or the occupier of such heritage, may institute a suit for compensation for the disturbance of the easement or of any right accessory thereto : provided that the disturbance has actually caused substantial damage to the plaintiff.

Explanation I.—The doing of any act likely to injure the plaintiff by affecting the evidence of the easement, or by materially diminishing the value of the dominant heritage, is substantial damage within the meaning of this section and section 34.

Explanation II.—Where the easement disturbed is a right to the free passage of light passing to the openings in a house, no damage is substantial within the meaning of this section, unless it falls within the first explanation, or interferes materially with the physical comfort of the plaintiff, or prevents him from carrying on his accustomed business in the dominant heritage as beneficially as he had done previous to instituting the suit.

Explanation III.—Where the easement disturbed is a right to the free passage of air to the openings in a house, damage is substantial within the meaning of this section if it interferes materially with the physical comfort of the plaintiff, though it is not injurious to his health.

Illustrations.

(*a*) *A* places a permanent obstruction in a path over which *B*, as tenant of *C's* house, has a right of way. This is substantial damage to *C*, for it may affect the evidence of his reversionary right to the easement.

(*b*) *A*, as owner of a house, has a right to walk along one side of *B's* house. *B* builds a verandah overhanging the way about ten feet from the ground, and so as not to occasion any inconvenience to foot-passengers using the way. This is not substantial damage to *A*.

When cause of action arises for removal of support.

34. The removal of the means of support to which a dominant owner is entitled does not give rise to a right to recover compensation, unless and until substantial damage is actually sustained.

Injunction to restrain disturbance.

35. Subject to the provisions of the Specific Relief Act, 1877, sections 52 to 57 (both inclusive) an injunction may be granted to restrain the disturbance of an easement—

(*a*) if the easement is actually disturbed,—when compensation for such disturbance might be recovered under this Chapter ;

(*b*) if the disturbance is only threatened or intended,—when the act threatened or intended must necessarily, if performed, disturb the easement.

Abatement of obstruction of easement.

36. Notwithstanding the provisions of section 24, the dominant owner cannot himself abate a wrongful obstruction of an easement.

CHAPTER V.

THE EXTINCTION, SUSPENSION AND REVIVAL OF EASEMENTS.

Extinction by dissolution of right of servient owner.

37. When, from a cause which preceded the imposition of an easement, the person by whom it was imposed ceases to have any right in the servient heritage, the easement is extinguished.

Exception.—Nothing in this section applies to an easement lawfully imposed by a mortgagor in accordance with section 10.

Illustrations.

(*a*) *A* transfers Sultanpur to *B* on condition that he does not marry *C*. *B* imposes an easement on Sultanpur. Then *B* marries *C*. *B's* interest in Sultanpur ends, and with it the easement is extinguished.

(*b*) *A*, *in 1860, let Sultanpur to B for thirty years from the date of the* lease. *B*, in 1861, imposes an easement on the land in favour of *C*, who enjoys the easement peaceably and openly as an easement without interruption for twenty-nine years. *B's* interest in Sultanpur then ends, and with it *C's* easement.

(*c*) *A* and *B*, tenants of *C*, have permanent transferable interests in their *respective holdings. A imposes on his holding an easement to draw water from* a tank for the purpose of irrigating *B's* land. B enjoys the easement for twenty years. Then *A's* rent falls into arrear and his interest is sold. *B's* easement is extinguished.

(*d*) *A* mortgages Sultanpur to *B*, and lawfully imposes an easement on the *land in favour of C in accordance with the provisions of s. 10.* The land is sold to *D* in satisfaction of the mortgage-debt. The easement is not thereby extinguished.

Extinction by release.

38. An easement is extinguished when the dominant owner releases it, expressly or impliedly, to the servient owner.

Such release can be made only in the circumstances and to the extent in and to which the dominant owner can alienate the dominant heritage.

An easement may be released as to part only of the servient heritage.

Explanation I.—An easement is impliedly released—

(*a*) where the dominant owner expressly authorises an act of a permanent nature to be done on the servient heritage, the necessary consequence of which is to prevent his future enjoyment of the easement, and such act is done in pursuance of such authority;

(*b*) where any permanent alteration is made in the dominant heritage of such a nature as to show that the dominant owner intended to cease to enjoy the easement in future.

Explanation II.—Mere non-user of an easement is not an implied release within the meaning of this section.

Illustrations.

(*a*) *A*, *B* and *C* are co-owners of a house to which an easement is annexed. *A*, without the consent of *B* and *C*, releases the easement. This release is effectual only as against *A* and his legal representative.

(*b*) *A* grants *B* an easement over *A's* land for the beneficial enjoyment of his house. *B* assigns the house to *C*. *B* then purports to release the easement. The release is ineffectual.

(c) *A*, having the right to discharge his eaves-droppings into *B's* yard, expressly authorizes *B* to build over this yard to a height which will interfere with the discharge. *B* builds accordingly. *A's* easement is extinguished to the extent of the interference.

(d) *A*, having an easement of right to a window, builds up that window with bricks and mortar so as to manifest an intention to abandon the easement permanently. The easement is impliedly released.

(e) *A*, having a projecting roof by means of which he enjoys an easement to discharge eaves-droppings on *B's* land permanently alters the roof, so as to direct the rain-water into a different channel and discharge it on *C's* land. The easement is impliedly released.

Extinction by revocation

39. An easement is extinguished when the servient owner, in exercise of a power reserved in this behalf, revokes the easement.

Extinction on expiration of limited period or happening of dissolving condition.

40. An easement is extinguished where it has been imposed for a limited period, or acquired on condition that it shall become void on the performance or non-performance of a specified act, and the period expires or the condition is fulfilled.

Extinction on termination of necessity.

41. An easement of necessity is extinguished when the necessity comes to an end.

Illustration.

A grants *B* a field inaccessible except by passing over *A's* adjoining land. *B* afterwards purchases a part of that land over which he can pass to his field. The right of way over *A's* land which *B* had acquired is extinguished.

Extinction of useless easement.

42. An easement is extinguished when it becomes incapable of being at any time and under any circumstances beneficial to the dominant owner.

Extinction by permanent change in dominant heritage.

43. Where, by any permanent change in the dominant heritage, the burden on the servient heritage is materially increased and cannot be reduced by the servient owner without interfering with the lawful enjoyment of the easement, the easement is extinguished, unless—

(a) it was intended for the beneficial enjoyment of the dominant heritage, to whatever extent the easement should be used; or

(b) the injury caused to the servient owner by the change is so slight that no reasonable person would complain of it; or

(c) the easement is an easement of necessity.

Nothing in this section shall be deemed to apply to an easement entitling the dominant owner to support the dominant heritage.

Extinction on permanent alteration of servient heritage by superior force.

44. An easement is extinguished where the servient heritage is by superior force so permanently altered that the dominant owner can no longer enjoy such easement.

Provided that, where a way of necessity is destroyed by superior force, the dominant owner has a right to another way over the servient herita and the provisions of section 14 apply to such way.

Illustrations.

(*a*) *A* grants to *B*, as the owner of a certain house, a right to fish in a river running through *A's* land. The river changes its course permanently and runs through *C's* land. *B's* easement is extinguished.

(*b*) Access to a path over which *A* has a right of way is permanently cut off by an earthquake. *A's* right is extinguished.

Extinction by destruction of either heritage.

45. An easement is extinguished when either the dominant or the servient heritage is completely destroyed.

Illustration.

A has a right of way over a road running along the foot of a sea-cliff. The road is washed away by a permanent encroachment of the sea. *A's* easement is extinguished.

Extinction by unity of ownership.

46. An easement is extinguished when the same person becomes entitled to the absolute ownership of the whole of the dominant and servient heritages.

Illustrations.

(*a*) *A*, as the owner of a house, has a right of way over *B's* field. A mortgages his house, and *B* mortgages his field to *C*. Then *C* forecloses both mortgages and becomes thereby absolute owner of both house and field. The right of way is extinguished.

(*b*) The dominant owner acquires only part of the servient heritage; the easement is not extinguished, except in the case illustrated in section 41.

(*c*) The servient owner acquires the dominant heritage in connection with a third person: the easement is not extinguished.

(*d*) The separate owners of two separate dominant heritages jointly acquire the heritage which is servient to the two separate heritages: the easements are not extinguished.

(*e*) The joint owners of the dominant heritage jointly acquire the servient heritage: the easement is extinguished.

(*f*) A single right of way exists over two servient heritages for the beneficial enjoyment of a single dominant heritage. The dominant owner acquires only one of the servient heritages. The easement is not extinguished.

(*g*) *A* has a right of way over *B's* road. *B* dedicates the road to the public. *A's* right of way is not extinguished.

Extinction by non-enjoyment.

47. A continuous easement is extinguished when it totally ceases to be enjoyed as such for an unbroken period of twenty years.

A discontinuous easement is extinguished when, for a like period, it has not been enjoyed as such.

Such period shall be reckoned, in the case of a continuous easement, from the day on which its enjoyment was obstructed by the servient owner, or rendered impossible by the dominant owner; and, in the case of a discontinuous easement, from the day on which it was last enjoyed by any person as dominant owner:

Provided that if, in the case of a discontinuous easement, the dominant owner, within such period, registers, under the Indian Registration Act, 1877, a declaration of his intention to retain such easement, it shall not be extinguished until a period of twenty years has elapsed from the date of the registration.

Where an easement can be legally enjoyed only at a certain place, or at certain times, or between certain hours, or for a particular purpose, its enjoyment during the said period at another place, or at other times, or between other hours, or for another purpose, does not prevent its extinction under this section.

The circumstance that, during the said period, no one was in possession of the servient heritage, or that the easement could not be enjoyed, or that a right accessory thereto was enjoyed, or that the dominant owner was not aware of its existence, or that he enjoyed it in ignorance of his right to do so, does not prevent its extinction under this section.

An easement is not extinguished under this section—

(a) where the cessation is in pursuance of a contract between the dominant and servient owners;

(b) where the dominant heritage is held in co-ownership, and one of the co-owners enjoys the easement within the said period; or

(c) where the easement is a necessary easement.

Where several heritages are respectively subject to rights of way for the benefit of a single heritage, and the ways are continuous, such rights shall, for the purposes of this section, be deemed to be a single easement.

Illustration.

A has, as annexed to his house, rights of way from the high road thither over the heritages X and Z and the intervening heritage Y. Before the twenty years expire, A exercises his right of way over X. His rights of way over Y and Z are not extinguished.

Extinction of accessory rights.

48. When an easement is extinguished, the rights (if any) accessory thereto are also extinguished.

Illustration.

A has an easement to draw water from B's well. As accessory thereto, he has a right of way over B's land to and from the well. The easement to draw water is extinguished under section 47. The right of way is also extinguished.

Suspension of easement.

49. An easement is suspended when the dominant owner becomes entitled to possession of the servient heritage for a limited interest therein, or when the servient owner becomes entitled to possession of the dominant heritage for a limited interest therein.

Servient owner not entitled to require continuance.

50. The servient owner has no right to require that an easement be continued; and, notwithstanding the provisions of section 26, he is not entitled to compensation for damage caused to the servient heritage in consequence of the extinguishment or suspension of the easement, if the dominant owner has given to the servient owner such notice as will enable him, without unreasonable expense, to protect the servient heritage from such damage.

Compensation for damage caused by extinguishment.

Where such notice has not been given, the servient owner is entitled to compensation for damage caused to the servient heritage in consequence of such extinguishment or suspension.

Illustration.

A, in exercise of an easement, diverts to his canal the water of *B's* stream. The diversion continues for many years, and during that time the bed of the stream partly fills up. *A* then abandons his easement, and restores the stream to its ancient course. *B's* land is consequently flooded. *B* sues *A* for compensation for the damage caused by the flooding. It is proved that *A* gave *B* a month's notice of his intention to abandon the easement, and that such notice was sufficient to enable *B*, without unreasonable expense, to have prevented the damage. The suit must be dismissed.

Revival of easements.

51. An easement extinguished under section 45 revives (*a*) when the destroyed heritage is, before twenty years have expired, restored by the deposit of alluvion; (*b*) when the destroyed heritage is a servient building and before twenty years have expired such building is rebuilt upon the same site; and (*c*) when the destroyed heritage is a dominant building and before twenty years have expired, such building is rebuilt upon the same site and in such a manner as not to impose a greater burden on the servient heritage.

An easement extinguished under section 46 revives when the grant or bequest by which unity of ownership was produced is set aside by the decree of a competent Court. A necessary easement extinguished under the same section revives when the unity of ownership ceases from any other cause.

A suspended easement revives if the cause of suspension is removed before the right is extinguished under section 47.

Illustration.

A, as the absolute owner of field Y, has a right of way thither over *B's* field *Z*. *A* obtains from *B* a lease of *Z* for twenty years. The easement is suspended so long as *A* remains lessee of *Z*. But when *A* assigns the lease to *C*, or surrenders it to *B*, the right of way revives.

CHAPTER VI.

LICENSES.

"License" defined.

52. Where one person grants to another, or to a definite number of other persons a right to do or continue to do, in or upon the immoveable property of the grantor something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property, the right is called a license.

Who may grant license.

53. A license may be granted by any one in the circumstances and to the extent in and to which he may transfer his interests in the property affected by the license.

Grant may be expressed or implied.

54. The grant of a license may be expressed or implied from the conduct of the grantor, and an agreement which purports to create an easement, but is ineffectual for that purpose, may operate to create a license.

Accessory licenses annexed by law

55. All licenses necessary for the enjoyment of any interest, or the exercise of any right, are implied in the constitution of such interest or right. Such licenses are called accessory licenses.

Illustration.

A sells the trees growing on his land to *B*. *B* is entitled to go on the land and take away the trees.

License when transferable.

56. Unless a different intention is expressed or necessarily implied, a license to attend a place of public entertainment may be transferred by the licensee; but, save as aforesaid, a license cannot be transferred by the licensee or exercised by his servants or agents.

Illustrations.

(*a*) *A* grants *B* a right to walk over *A*'s field whenever he pleases. The right is not annexed to any immoveable property of *B*. The right cannot be transferred.

(*b*) The Government grant *B* a licence to erect and use temporary grain-sheds on Government land. In the absence of express provision to the contrary, *B*'s servants may enter on the land for the purpose of erecting sheds, erect the same, deposit grain therein and remove grain therefrom.

Grantor's duty to disclose defects.

57. The grantor of a licence is bound to disclose to the licensee any defect in the property affected by the licence, likely to be dangerous to the person or property of the licensee, of which the grantor is, and the licensee is not, aware.

Grantor's duty not to render property unsafe.

58. The grantor of a licence is bound not to do anything likely to render the property affected by the licence dangerous to the person or property of the licensee.

Grantor's transferee not bound by licence.

59. When the grantor of the licence transfers the property affected thereby, the transferee is not as such bound by the licence.

Licence when revocable.

60. A licence may be revoked by the grantor, unless—

(*a*) it is coupled with a transfer of property and such transfer is in force;

(*b*) *the licensee, acting upon the licence, has executed a work of a* permanent character and incurred expenses in the execution.

Revocation express or implied.

61. The revocation of a licence may be [illegible] implied.

Illustrations.

(*a*) *A*, the owner of a field, grants a licence to *B*, to use a [illegible] *A*, with intent to revoke the licence, locks a gate across the path [illegible] revoked.

(*b*) *A*, the owner of a field, grants a licence to *B* to [illegible] *A lets or sells the field to C.* The licence is revoked.

Licence when deemed revoked.

62. A licence is deemed to be [illegible]

(*a*) when, from a cause preceding the grant of it, the grantor ceases to have any interest in the property affected by the licence;

(*b*) when the licensee releases it, expressly or impliedly, to the grantor or his representative;

(*c*) where it has been granted for a limited period or acquired on condition that it shall become void on the performance or non-performance of a specified act, and the period expires, or the condition is fulfilled;

(*d*) where the property affected by the licence is destroyed or by superior force so permanently altered that the licensee can no longer exercise his right;

(*e*) where the licensee becomes entitled to the absolute ownership of the property affected by the licence;

(*f*) where the licence is granted for a specified purpose and the purpose is attained, or abandoned, or becomes impracticable;

(*g*) where the licence is granted to the licensee as holding a particular office, employment or character, and such office, employment or character ceases to exist;

(*h*) where the licence totally ceases to be used as such for an unbroken period of twenty years, and such cessation is not in pursuance of a contract between the grantor and the licensee;

(*i*) in the case of an accessory license, when the interest or right to which it is accessory ceases to exist.

Licensee's rights on eviction.

63. Where a licence is revoked, the licensee is entitled to a reasonable time to leave the property affected thereby and to remove any goods which he has been allowed to place on such property.

Licensee's rights on eviction.

64. Where a licence has been granted for a consideration, and the licensee, without any fault of his own, is evicted by the grantor before he has fully enjoyed, under the licence, the right for which he contracted, he is entitled to recover compensation from the grantor.

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